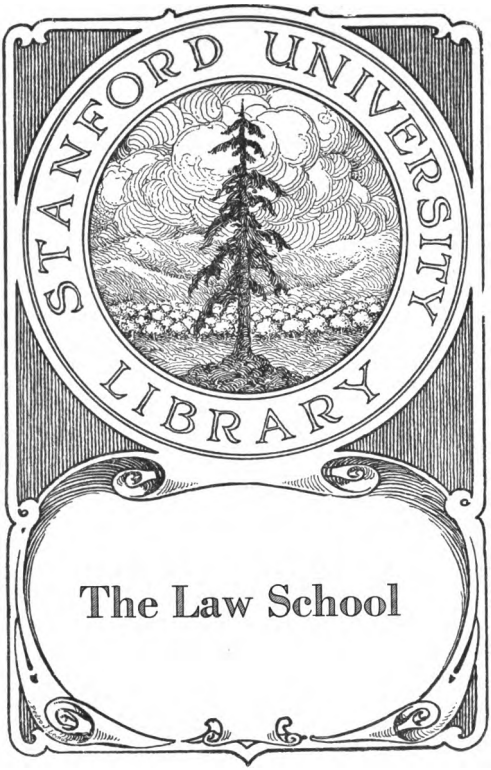

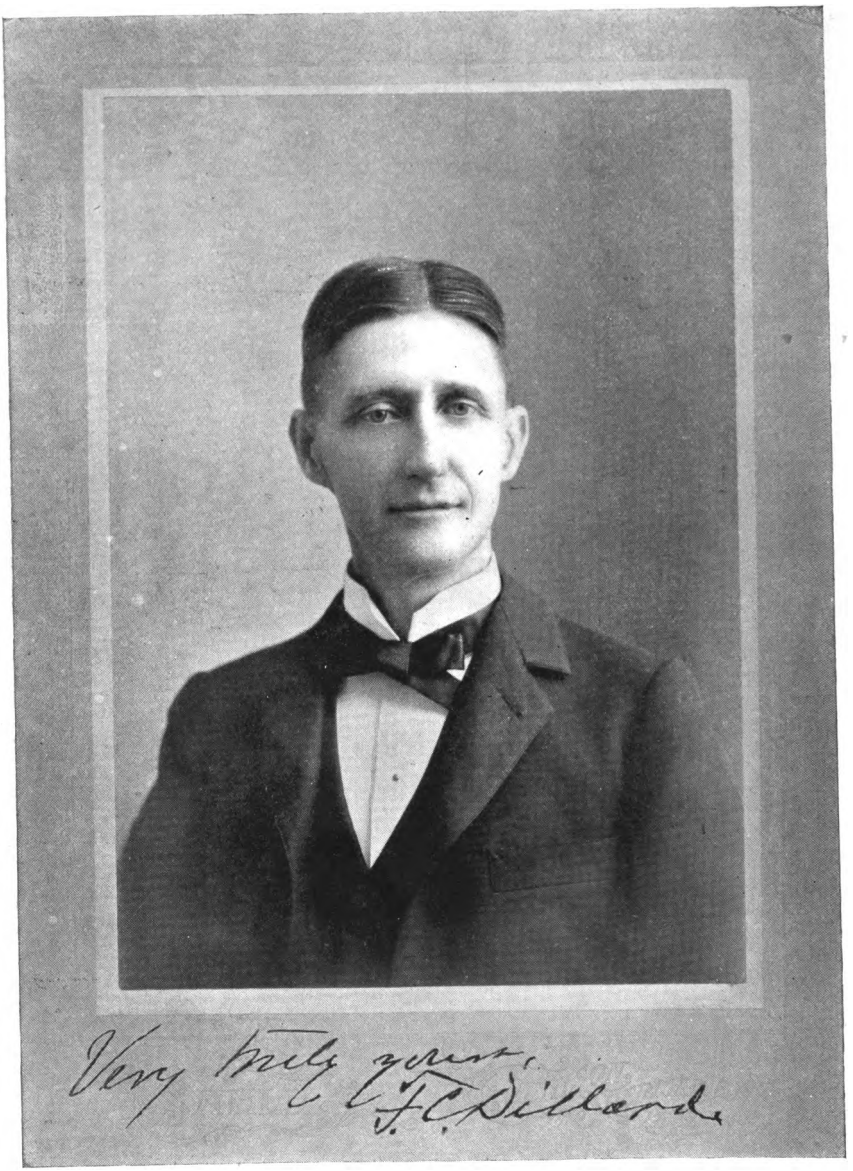

PRESIDENT.

PROCEEDINGS

OF THE

SEVENTEENTH ANNUAL [illegible]

OF THE

TEXAS BAR ASSOCIATION,

HELD AT

[illegible]

WITH

[illegible]

A

[illegible]

AUSTIN:
PRINTED BY [illegible]
1898.

PROCEEDINGS

OF THE

SEVENTEENTH ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION,

HELD IN THE

CITY OF GALVESTON, JULY 27, 28 AND 29, 1898,

WITH THE

OFFICERS, STANDING COMMITTEES AND ROLL OF MEMBERS

FOR THE YEAR 1898-99,

AND

RULES FOR THE COURTS OF TEXAS.

AUSTIN:
PRINTED BY ORDER OF THE ASSOCIATION.
1898.

These Proceedings are published by authority and distributed to members of the Association.

CHARLES S. MORSE, *Secretary.*

The eighteenth annual session of the Association will be held in the City of Galveston, on the last Wednesday in July, A. D. 1899.

PROCEEDINGS

OF THE

SEVENTEENTH ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION,

HELD IN THE

CITY OF GALVESTON, JULY 27, 28 AND 29, 1898.

FIRST DAY.—MORNING SESSION.

The Seventeenth Annual Session of the Texas Bar Association was held in the city of Galveston, commencing Wednesday, July 27th, 1898.

Hon. Wm. Aubrey, President of the association, called the meeting to order, and, a quorum being present, the reading of the minutes of the last annual meeting was, on motion, dispensed with.

The regular order of business was dispensed with in order to allow the Board of Directors to make the following report:

To the President and Members of the Texas Bar Association:

The Board of Directors submits the following Report and Order of Business:

FIRST DAY.

1. Election of new members.
2. Opening address of the President.
3. Election of Board of Directors.
4. Reports of Secretary and Treasurer.
5. Report of Committee on Jurisprudence and Law Reform.

6. Report of Committee on Judicial Administration and Remedial Procedure.
7. Report of Committee on Legal Education and Admission to the Bar.
8. Report of Committee on Commercial Law.
9. Report of Committee on Criminal Law.
10. Report of Committee on Publication.
11. Report of Committee on Grievances and Discipline.
12. Report of Special Committee.

SECOND DAY.

1. Annual Address, by Judge Samuel J. Hunter.
2. "Science and Sentiment," by the Hon. Norman G. Kittrell.
3. "Recent Noteworthy Decisions of Our Texas Courts," by Hon. B. R. Webb.
4. "The New Bankruptcy Law," by Judge Geo. E. Miller.
5. Any business left over from the first day.

THIRD DAY.

1. "The Courts," by Hon. Jonathan Lane.
2. "In the known certainty of the Law there is safety for all," by the Hon. W. A. Kincaid.
3. Election of officers.
4. Miscellaneous business.
5. Selection of the place of the next annual meeting.

We recommend that after each paper or report is read a free discussion thereof immediately follow.

We have examined the reports of the Secretary and Treasurer for the past year and we find the reports correct, and recommend that they be adopted.

We recommend that the following applicants be duly elected members of this association: Carlos Bee, San Antonio; J. D. Childs, San Antonio; John L. Dyer, Jr., Waco; H. G. Evans, Bonham; R. A. Greer, Beaumont; J. D. Guinn, San Antonio; Theodore Harris, San Antonio; Yale Hicks, San Antonio; Byron Johnson, Galveston; John A. Kirlicks, Galveston; J. R. Norton, San Antonio; J. F. Onion, San Antonio; Edwin B. Parker, Houston; John L. Peeler, Austin; W. M. Petticolas, Victoria, John Sehorn, San Antonio; W. W. Turney, El Paso; James R Tolbert, Vernon.

Respectfully Submitted,

H. C. CARTER,
P. K. EWING,
F. C. PROCTOR.
Directors.

On motion the report of the Board of Directors was adopted, and the applicants recommended by them were duly elected members of the association.

The Secretary then read his annual report, which is as follows:

GALVESTON, TEXAS, July 27, 1898.

To the President and Board of Directors of the Texas Bar Association:

GENTLEMEN:--I have the honor to submit herewith my seventeenth annual report as Secretary. My last report published in full in the proceedings of last meeting, pages 6-8, shows that the Board of Directors had drawn drafts on the Treasurer for accounts due for $446.25, and the Treasurer's report shows there was but $147.44 on hand. This left a balance due of $298.81 to be collected and paid.

There were twenty-nine new members elected at last meeting from whom I collected five dollars each, amounting to $145, and I have collected dues for 1897 since my last report from eighty-three members at $2.50 each, amounting to $207.50, and back dues $27.50, making a total of $380, which, added to the amount in hands of Treasurer makes a total of $527.44, out of which was paid the drafts of $446.25, drawn by the Board of Directors for 1897, which left a balance on hand of $81.19 in the treasury.

I attach hereto a list of the members from whom I received the amounts stated above.

The expenses for publishing the proceedings of 1897, postage, envelopes, etc., down to date of this present meeting amount to $465.95, as per itemized statement, receipts, etc., examined and approved by the Board of Directors. The Treasurer has on hand but $81.19 with which to pay this amount, leaving a balance due of $384.76 to be paid from the results of this meeting and the dues of all members for 1898. It is confidently expected that the amounts collected will be amply sufficient to do this and still leave a balance to be placed in the treasury.

Some few members have promptly remitted their annual dues for 1898, but no mention of this is made in this report, as no receipts have yet been forwarded, and I think it advisable for the entire amount of dues for 1898 to appear in full in the Secretary's report for 1899.

The average annual expenses of the association,—getting out the proceedings, printing, stationery and postage,—is $450, and if the members will all pay promptly there will be more than a sufficient fund to pay all expenses and provide well for an annual banquet.

Some of our members are in arrears over four years for dues, and while the by-laws require me to drop their names from the roll, I have hesitated to do so, trusting that the amount in arrears would be paid. In some instances this has been done, but I am now instructed again to drop from the roll of membership the name of any member who fails to pay such dues prior to the time of printing the proceedings of this session.

An examination of the roll of members, as printed in the proceedings of our last annual session, shows we then had three hundred and seven members, eight of whom are not with us today, for their names have been added to the roll of deceased members.

I think it was a good plan for the Secretary to publish in the printed proceedings, the name of each member who pays dues, as was done for a few years, and I regret that the association has directed otherwise. He must continue, however, to furnish such list to the Board of Directors, and I have attached such list to this report.

I also submit herewith a list of new members received at last meeting:

W. W. Anderson, Velasco; A. J. Bell, Karnes City; Grant R. Bennett, Galveston; L. C. Clifton, Farmersville; Henry Ben Cline, Hous-

ton; John T. Duncan, LaGrange; R. R. Gaines, Paris; Hiram Glass, Texarkana; C. Grempczynski, Galveston; E. A. Hawkins, Jr., Galveston; N. Henderson, Wichita Falls; J. S. Hogg, Austin; J. A. Holland, Orange; W. M. Holland, Houston; S. P. Huff, Wichita Falls; Ashby S. James, Austin; C. L. Jester, Corsicana; A. D. Lipscomb, Crockett; Geo. E. Miller, Wichita Falls; J S. McEachin, Richmond; J. B. McMahon, Temple; D. R. Pearson, Richmond; R. B. Pool, Cameron; Sam Streetman, Cameron; William Thompson, Dallas; Mann Trice, Dallas; William H. Wilson, Houston; W. A. Wright, San Angelo and John L. Young, Dallas.

Respectfully submitted,

CHAS. S. MORSE,
Secretary.

The Treasurer then presented and read his annual report as follows:

GALVESTON, TEXAS, July 27, 1898.

To the President and Board of Directors of the Texas Bar Association:

Gentlemen: I have the honor to submit herewith my annual report as treasurer, showing the receipts and disbursements for the past year:

Receipts:

Balance on hand, per last report	$147.44
Amount received from secretary	380.00
Total	$527.44

Disbursements:

Amount paid attached drafts drawn by board of directors.	$446.25
Balance in treasury	$81.19

Respectfully submitted,

WM. D. WILLIAMS,
Treasurer.

The following members of the association were elected to serve as a Board of Directors for the next year: T. J. Ballinger, Galveston; M. A. Spoonts, Fort Worth; W. C. Oliver, Houston; T. H. Wash, San Antonio, and A. E. Wilkinson, Austin.

The Committee on Jurisprudence and Law Reform asked for and were granted until tomorrow morning to present their report.

The Committee on Judicial Administration and Remedial Procedure were granted until tomorrow to complete and present their report.

The Committee on Legal Education and Admission to the Bar

was present and, through its chairman, presented the following report:

To the Texas Bar Association:

Your Committee on Legal Education and Admission to the Bar begs leave to submit the following report:

The position of the lawyer in our government is a peculiarly responsible one. His functions are three-fold. He is entrusted with the most valuable rights of person and property of his clients; he is one of the most active instruments in the administration of the law, and exercises a great influence upon public sentiment. He is the confidential advisor of his client; the legal counsellor and assistant of the judge; the potent and helpful leader of the jury; the promoter and moulder of public thought on legal and political questions; and very frequently an active participant in its shaping on other matters of general interest. While his business is private it affects the public in more and more vital points than any other profession or avocation. The world is realizing more fully each succeeding year that law is only ripened public sentiment; and that the real lawmaker is the leader of public thought. No one has larger opportunity and share in this than the lawyer in active practice. The superiority of the lawyer's position in this respect is recognized; and very frequently the profession is resorted to as a vantage ground from which more readily to bring one's self into public notice, and impress one's opinions upon the public mind.

The business side of the lawyer's life is little less powerful in its influence upon the sentiment and character of the people at large than is his public life. The lawyer who counsels, or even countenances and undertakes to uphold business methods of doubtful character becomes a center of corruption to the entire body of his clientage; and a few such men in any community will gradually canker its heart until large numbers of its members will lend themselves to sharp practices and questionable devices and the upright and honorable can scarcely maintain themselves in its midst. On the other hand, if the lawyers in a community are uniformly honest and honorable, advising only that which is right and discountenancing and refusing to identify themselves in any way with schemes which are wrong, or even doubtful, in their character, they act as a tonic upon the business health of the community, and honest methods and fair dealing will characterize its business life.

Deep and abiding as is this public interest in the lawyer, it is not near so great as is the interest of the several members of the profession in each other. The bar has a collective character and a collective reputation, and each member of it finds himself personally involved to a greater or less extent in the good name or evil repute of his professional brother. Each good man in the profession as day by day he demonstrates by a life of probity and honor his value to his community and State adds to the general good name of the bar; and each disreputable practitioner who abuses his trust, tends in some measure to lower the general estimate of the profession to which he belongs.

The points of contact in the lives of lawyers practicing at the same bar are so many, and the occasions for exercise of professional courtesy are so frequent and the necessity for relying upon professional integrity is so great, that it is a matter of paramount importance to all honorable men in the profession that all its members shall be of like

character. A day rarely passes in which the lawyer in full practice is not to some extent placed in the power of some other member of the bar. Agreements in which large interests are involved are constantly and as it seems in some instances unavoidably made in such form as to be incapable of legal enforcement; court papers and other public documents are taken from public officers upon the responsibility of one lawyer and pass into the hands of others; money for which two or more are responsible is collected and handled by one; professional secrets which it would be a crime to divulge must be freely discussed with associate counsel; and in innumerable other ways the attorney daily finds himself brought into relations with other members of the bar absolutely demanding mutual respect and confidence Truly among lawyers "no man liveth to himself alone," but each lives and moves and has his being in intimate and almost indissoluble connection with the members of the bar about him.

From these considerations arise the duty of the State, and the supreme interest of the lawyer, in the adoption of measures reasonably calculated to exclude from the bar all unfit persons and to expel therefrom all men of bad character who by any means shall be permitted to enter it.

The first thing to be considered in adopting such regulations is the qualifications which a lawyer should possess. The interest of the public and of the bar and of all litigants require that the standard should be high. There are four characteristics that are essential and which should be possessed by every one to whom license is granted:

1. Good moral character.
2. Fair natural ability.
3. Fair general information.
4. Thorough familiarity with both the principles and rules of law.

It is the prerogative of the State to require that these qualities be possessed by every one to whom permission to practice is granted, and it is her duty to use reasonable diligence to insure compliance with such requirement. This duty exists at all times but as population grows and business competion in all lines increases the necessity for its discharge becomes more apparent. There has been a very general movement in England and in the United States in recent years to raise the requirements for admission to the bar. A large number of the American States have within the last decade radically changed their legislative enactments on this subject. In every instance the changes have raised the standard; many of them going much beyond the suggestions hereinafter made in regard to the length of study required and the degree of attainment both in general and in legal matters.

Believing that an approximately correct statement as to the number of attorneys licensed annually in Texas would be both interesting and instructive to the association the committee last fall addressed a letter to every district clerk in the State requesting information:—first, as to the number of persons admitted to the Bar by the district courts in their respective counties during the sasociational year of 1896-97; and second, requesting that during the early part of this month they would forward similar information as to the associational year of 1897-98. We regret to state that the responses were not so numerous as we had hoped and the information received not so extensive or reliable as we had desired. It may, however, aid somewhat in arriving at correct conclusions. Answers were received from forty-eight counties; most of them small and representing approximately about one-

sixth of the population of the State. Sixty-eight licenses were issued in these counties for the year beginning August 1st, 1896, and ending August 1st, 1897. From this it is probable that four hundred persons were licensed in the district courts throughout the State. This does not include the fifty-five students graduated from the University of Texas during that year who procured licenses from the Supreme Court. While these figures are not accurate, they show the large number of accessions to the bar in Texas yearly. It becomes the State of Texas to look carefully into these facts and deal wisely with them.

That the present statute is not satisfactory is admitted by all. It lacks almost every feature which should characterize any rational law on this subject. The required certificate as to good character can be obtained from the commissioners court without further evidence than an oral statement, and in many districts certificates from courts of counties in which the applicant does not reside are received. The only requirement with reference to opportunity for acquiring information is that the applicant should have read the law books enumerated by the Supreme Court in its rules, or equivalent works, and this is rarely insisted upon; the length of time to be devoted to study nor the manner of study are not designated. No requirement as to general information exists. The examinations are oral in almost every instance, by a picked-up committee whose members have no special preparation for their work and who have not given it any thought or attention if otherwise capable. The examination must be conducted in open court, and very frequently, owing to the crowded condition of the docket and the press of business, the judge and each member of the committee is anxious to consume as little time as consistently can be done. The result is that in most instances the examinations are farces tending rather to demonstrate the lack of preparation on the part of the committee than of qualification on the part of the candidate. Beside, the habit of sinning under this law has become so fixed that even the staunchest members of the bar can scarcely stand against the accumulated precedents for slackness and comparative indifference, and committee after committee reports favorably upon applicants who, if in fact possessed of the required qualifications, have had no fair opportunity to make that fact known.

Uniformity of results under the present law is impossible, except by licensing every candidate. There are more than fifty district courts in Texas, each presided over by a different judge, and possibly no two of them entertaining exactly the same ideas on this subject. In many of these districts there are a number of counties, the bar in no two of which is identical. There are no rules prescribed for the government of the courts or the committees in the examinations; so that it is almost universally true that each examination is conducted by a different committee. Uniformity of procedure or result could not be expected under such conditions. So true is this, that in the rare cases in which the applicant is unsuccessful in his home county he takes a change of venue on his own motion to an adjoining county, or it may be to an adjoining district if he shall have acquired a prejudice against the judge in his former attempt, and by so doing succeeds in removing his deficiencies, has a favorable report from an indifferent committee, comes back to his home and opens an office beside the members of the committee who manifested so little appreciation as to refuse to recommend him.

The purpose of all laws with reference to licensing attorneys, is to insure, as far as it may be done, the mental and moral fitness of the

proposed lawyer, but it does not follow that attention may not be justly paid to other things beside the seeming direct result of an examination. And a wise law should take some account of opportunity for study also. Acting upon this idea the lawmakers have recently incorporated into the statutes provisions specifying the length of time which must be devoted to the study of the law, and also as to the manner in which the study must have been conducted. This, we think, is important, for while it is true that some men may learn more readily than others, it is also true that it takes about the same length of time for the majority of men to do approximately the same amount of mental labor.

Any law on this subject to be satisfactory should provide for reasonably sufficient evidence by the applicant of his good moral character; of fair opportunity to have acquired a fair amount of general information, of fair opportunity to have learned the principles and rules of law, and that he had really availed himself of these opportunities and possessed the information, general and legal.

After a careful study of recent statutes and rules of court in several of the States, we suggest the following outline of a system or law which would be just, uniform in its operation and reasonably effective.

First. All permanent licenses to practice law should be granted by the Supreme Court of the State. Every license so granted to entitle the licentiate to practice in any court in the State subject to the right in every district and county court to suspend the license as to that particular court for legal cause for a time specified or until the order of suspension should be set aside by the Supreme Court.

Second. That licenses should only be granted by the Supreme Court after examination of the candidate by a committee consisting of five members appointed by the Supreme Court, composed of one lawyer of experience and recognized ability resident in each supreme judicial district of the State, or upon diploma from the State University of Texas.

Third. That all examinations by the committee be in writing, and be held at designated times with intervals of six months at the places of meeting of the several Courts of Civil Appeals in the respective districts. That the examinations of each candidate thoroughly cover the entire course prescribed by the Supreme Court. That all questions to be propounded in any examination shall be the same in all districts and before being used must have been approved by the committee or a majority of its members. That the examinations be simultaneous in all districts, the resident member of the committee in each district conducting the examinations therein. That the answers of all applicants shall immediately after the examination is completed be brought before the committee and passed upon by it. That the grade required for passing the examination be fixed in advance and uniform as to all, and no person shall receive license unless he makes the required grade and is recommended by the committee. That no examination shall be held at any other time or place and any person failing to pass should have the privilege of re-examination only at subsequent regular time.

Fifth. Each applicant must be at least twenty-one years of age and a resident of the district in which the application is made, and must have resided in the State at least one year before his examination; must be of good moral character; must have good natural ability; must have fair general English education; and must have good knowledge of the law.

The English education required should be at least equivalent to the requirements for first class State teachers' certificate.

He must have occupied in his legal studies at least two sessions of nine months each in some law school of recognized standing, or at least two years in a law office under the direction of and with substantial assistance from an attorney or attorneys of good standing. The attendance upon school or work in the office shall be proven by a certificate from the instructor.

Sixth. Each application shall be in writing prepared by the applicant without assistance and filed with the clerk of the Court of Civil Appeals in the proper district ten days before the time set for holding the examination. This application to be considered by the committee in determining the qualification of the candidate.

Seventh. Each application shall be accompanied by a fee of fifteen dollars to cover the expense of the examining committee and for the clerks of the court under the direction of the Supreme Court.

Eighth. The applicant shall be required to furnish a certificate from the commissioners court of the county in which he resides, given within three months of the date of his examination, certifying that he has been a resident of the State of Texas for a sufficient time to amount to at least one year prior to the date of the examination and is then a resident of that county; that he is a man of good moral character, honorable and trustworthy in his business dealings. This certificate shall not be given by the commissioners court until the applicant shall produce and file with that court affidavits by two well-known residents of the county embracing the matters above indicated. These affidavits to be filed with the commissioners court and recorded in the minutes of that court.

All licenses granted by the Supreme Court to be subject to cancellation by that tribunal for unprofessional conduct to be judged of by that court from matters transpiring therein or upon affidavit or in proper cases upon the verdict of a jury taken in the district or county court and certified to the Supreme Court.

That the judges of the several district and county courts shall have authority to suspend from practicing for a reasonable time any member of the bar guilty of improper conduct regarding any case pending in such court, and the district courts to have jurisdiction to hear and determine the facts in any case of alleged unprofessional conduct; and in case of a verdict of conviction the district court shall transmit the record to the Supreme Court for the entry of such judgment thereon as that court shall hold the law may require.

Parties licensed to practice as attorneys at law in the highest court of original jurisdiction in any other State who desire to appear in special cases in which they have been retained outside the State shall be permitted to do so upon motion of any responsible attorney of the court in which the case is pending. Attorneys who have been licensed in the highest courts of any State and who move to Texas may be granted permanent license by the Supreme Court of this State upon the presentation of a license from said court of the other State, accompanied by a certificate from the judge of said court that the applicant is a man of good moral character. Such presentation need not be made in person, but the license, certificate of the judge and the applicant's oath as an attorney of the court, accompanied by the proper fee, may be forwarded by mail.

Any person holding license from a court of record of another State other than the court of last resort in civil matters, upon presenting

such license and satisfactory evidence of good character, and the payment of the lawful fee, may receive a temporary license from the Supreme Court entitling him to practice within this State until the time of the next examination, when he will be required to be examined as other applicants.

These recommendations are but local applications of what seemed to be the best provisions of such recent laws on this subject as have been accessible to us. They are not near so exacting as to the length of time required for study and the amount of information, either general or legal, as is required in many of the States in the union; and they do not compare in these respects with the laws of either England or Continental Europe.

It would make this report too lengthy to go into the details of these different American and European laws. The committee respectfully recommends the proceedings of the American Bar Association for the last several years, particularly of the sessions of 1895, 1896 and 1897 to the careful consideration of the members of this association. In them will be found a great deal of useful information with respect to the recent changes and present requirements for admission to the bar in the different States and countries.

Respectfully submitted,

JOHN C. TOWNES,
Chairman.

A motion to adopt the report of the committee created considerable discussion. At the request of Mr. R. G. Street the first three sections were reread and their meaning more fully explained by Chairman Townes. Mr. Street then moved, as a substitute to the motion to adopt, that all subsequent sections, after section three, be stricken out, and that the report be so amended as to give the judges of the Supreme Court jurisdiction in the matter for granting license for practicing law, and authorized them to make such rules and regulations touching the qualifications of applicants for admission to the bar as they may deem necessary. Mr. W. A. Kincaid stated that the Supreme Court already had the right to regulate admissions to the bar and to prescribe the necessary qualifications of applicants for license. This right, he claimed, has not been exercised by the Supreme Court, and he was in favor of the adoption of the entire report of the committee.

Mr. W. H. Clark, of Dallas, spoke against the motion to substitute, stating that he heartily approved the committee's report.

Mr. Leo N. Levi spoke in favor of the report and against the motion to substitute. His only objection to the report was that, while it was a step in the right direction, it did not go far

enough, and could better be added to than taken from. One point of its weakness which occurred to him, was that no remuneration was provided for the examiners, and he thought that in order to obtain the very best men as examiners that a suitable remuneration should by all means be provided.

Judge Townes stated that the intention of the committee was that the Supreme Court should pay the clerks and the examiners out of the funds arising from the fees paid by applicants.

Mr. Levi stated that Universities and Schools of Law jealously guard the reputation of their institutions, and are particularly careful that no graduate should go forth with one of their diplomas unless he is well qualified for the practice of law. He believed steps should be taken to insure the same standard outside the universities, and offered as an amendment to the motion to adopt, that the same committee who made the report be directed to draft a bill to be presented to the legislature, and that this committee use every possible means to insure and procure the passage of the bill.

President Aubrey called Mr. Levi to the chair and addressed the association. He stated that the report of the committee suggested a reform that was of more importance to the people than to the lawyers, who, from time immemorial, had been able to take care of themselves. He was well pleased with the suggestion of Mr. Levi concerning the universities and law schools and he believed that the board of examiners, suggested in the report of the committee, should constitute a university in itself, and there would then be three safeguards in the matter of licensing applicants for legal honors—first, the district examiner, then the board of examiners, and, lastly, the Supreme Court. Then it is a system—it is a substitute for no system. At present the most disqualified men are now admitted to the bar to disgrace the profession and impose upon the public. He favored the report as presented by the committee and wanted the committee not only to go before the legislature with a bill, but also to write every member of this bar association to get in touch with their representatives and get them interested in the matter,

so that the bill might not be sidetracked by purely political measures as had so often been the case in the past.

A vote was then taken on Mr. Street's motion to substitute the report of the committee, and the motion to substitute or to strike out certain portions was lost.

The President stated that the question before the association was the amendment offered by Mr. Levi that the committee who presented the report should be constituted a special committee to prepare and present a proper bill to the next legislature.

Mr. F. C. Dillard, of Sherman, favored the adoption of the report of the committee and suggested that it be referred to an entirely new committee, to be hereafter appointed, which shall be charged with the duty of presenting all matters recommended by the association to the legislature, early in the session.

Mr. Levi declined to accept the amendment, or suggestion of Mr. Dillard, for the reason that the Committee on Legal Education and Admission to the Bar, which had presented their carefully prepared report had given the subject so much thought and took so much interest in the matters presented that he felt sure the entire subject would receive the best attention from the hands of that committee.

Mr. H. C. Carter was in favor of the report as a whole but was rather opposed to the provisions of the suspension clause. He thought the Supreme Court should be the sole judge and should have the sole power of suspension, stating that he preferred to have such power vested in a tribunal not in such close touch with common politics.

Mr. Presley K. Ewing stated his belief that the association was almost unanimously in favor of the general principles recommended by the Committee on Legal Education and Admission to the Bar, and he would regret to see any vote taken on the report which would indicate otherwise. He thought it would be best to have no division upon matters of detail. The recommendations had not yet been drafted into the form of a bill, and they would receive careful attention from a learned committee and the scrutiny of the legislature as well. He moved that the

report be received and that the committee be requested to draw a bill to secure the enactment of a law along the lines of the recommendation.

Mr. Carter then stated that as the report was not yet a bill, and that the bill when properly drawn would most probably elaborate the points suggested and throw proper safeguards around lawyers to protect them from illiterate judges and politicians, he would withdraw his objections.

The report of the committee was then adopted.

Mr. Levi then renewed his motion to refer the report back to the committee with instructions that said committee be directed to use all possible efforts to secure the passage of a bill embodying the recommendations therein suggested and as approved and adopted by this association.

Judge Townes suggested that some other member of the Association be appointed on this committee, and that the committee designate some member, other than himself, to act as its chairman, giving as his reason for this suggestion that some other member would have more influence with the legislature. The association thought otherwise and refused to relieve Judge Townes from his position as chairman of the committee, and Mr. Levi's motion was unanimously adopted.

Mr. J. D. Childs suggested that the committee prepare and present its bill on the first day of the legislative session if possible.

On motion, the association adjourned until 3 o'clock p. m.

FIRST DAY.—Evening Session.

The President called the meeting to order at 3 o'clock.

The Board of Directors made the following report:

To the President and Members of the Texas Bar Association:

Your Board of Directors have had before them applications for membership of the following attorneys of the Bar of Texas, and, they hav-

ing paid the required fee, reccommend that they be elected members of this Association: Alex Barttlingck, Houston; Sam B. Cantey, Fort Worth; Walter Gresham, Jr., Galveston; J. H. Wood, Sherman; and B. H. Rice, Marlin.

Respectfully submitted,

T. J. BALLINGER,
M. A. SPOONTS,
A. E. WILKINSON,
For Board of Directors.

On motion the report was received and the applicants duly elected members of the association.

Mr. H. C. Coke, Chairman of the Committee on Commercial Law, presented and read the following report:

To the Honorable William Aubrey, President Texas Bar Association:

Your Committee on Commercial Law beg leave to report as follows:

The duties of this Committee are defined in Section IV., Article 6, of the by-laws of the association, which provides: "It shall be the duty of the Committee on Commercial Law to report the best means to produce uniformity in commercial law and usages."

Your committee does not understand it to be its duty to deal with existing commercial law and usages of this State, or to point out such defects as may be believed to exist therein, or to suggest corrections thereof; but simply to report as to the best means to produce uniformity in such laws and usages throughout the United States.

From natural and obvious causes there has grown up a great diversity in the laws and usages prevailing in the different parts of this country, and especially in those laws and usages which may be properly called "commercial." While this diversity increased with the creation of each new State, and with each session of the legislatures of the several States, the conditions prevailing for many years were such that this diversity did not reach or touch the great majority of the citizens of the several States and the pursuits and avocations in which they were engaged, and as a consequence its extent remained unknown.

But when the great railroad and steamship lines and systems, the telegraph and telephone, and the march of unparalleled material progress in every direction throughout the country had obliterated industrially and commercially the artificial State line, and brought the same individual in frequent contact with the laws of more than one and sometimes of many jurisdictions, the knowledge of the extent of this diversity of law and an appreciation of its evils became general, and there went up, not only from lawyers, but from those engaged in almost every branch of industry and commerce, a clamor for reform.

From the nature of the subject it is apparent that substantial relief must come principally through the action of the States themselves. Some of the subjects upon which uniformity of law is desirable are not within the jurisdiction of the Federal government at all, and in most of the others Congress could only legislate to control the action of the Federal courts.

When the evils of diversity of laws began to be felt and appreciated,

and the subject of uniformity therein to be seriously agitated, it was naturally conceded to be the duty of the legal profession to point out and suggest the best means of attaining the desired uniformity. Responding to this recognized obligation, the American Bar Association, by its constitution adopted more than twenty years ago, in its first article, declared one of its objects to be, "To promote uniformity of legislation throughout the union." To this subject that association has ever since devoted much attention. Some of the State associations, likewise, gave the matter their attention, but no very definite results were reached and no plan of action formulated.

The early stages of the work performed by the American Bar Association in this field consisted principally of pointing out, through the reports of committees and papers and addresses read before the association, the extent of this diversity and its practical effects,—a work educational, rather than remedial. It was not until 1889 that any definite action was taken looking to the application of a remedy. In that year the association appointed a committee of one from each State to promote the cause of uniformity of law, and in the following year, recommended the passage of a statute by each State for the appointment of commissioners to examine certain specified subjects and to meet in convention and draft uniform laws to be submitted for approval and adoption to the several States. This plan has secured most flattering results so far as co-operation is concerned, without which the end sought is impossible of attainment, until at the present time thirty States and one Territory have appointed commissioners, as follows: New York, Massachusetts, New Jersey, Michigan, Delaware, Georgia, Mississippi, Connecticut, Wisconsin, Kansas, New Hampshire, North Dakota, Wyoming, Minnesota, Nebraska, Illinois, South Dakota, Virginia, Iowa, Montana, Maine, Florida, Missouri, Colorado, South Carolina, Vermont, Rhode Island, Maryland, Ohio, California, and Oklahoma.

If the future can be judged by the past, it is but a short time before substantially all of the States and Territories are represented in this work.

The commissioners so appointed meet in annual conference at the place of meeting of the American Bar Association and usually a few days before the association. Usually these commissioners are three from each State, appointed for five years, with authority to confer with like commissioners from other States and recommend forms of bills or measures on those subjects where uniformity seems desirable and attainable. The commissioners generally serve without compensation, but in most cases are allowed their reasonable expenses by the State. These commissioners from the several States and territories, form what is called the "Conference of Commissioners on Uniform State Laws." For the better accomplishment of the work with which they are charged, these commissioners have formed themselves into a national body with a President, Vice-President, Secretary and Assistant Secretary, annually elected. Thus far seven conferences have been held, and the next will be held at Saratoga on the 15th of August.

Absolute uniformity in laws throughout the Union under our system of governments is practically impossible, and, perhaps, in many particulars is not especially desirable; but substantial uniformity in those laws which affect directly the citizens of more than one State, and in many cases the citizens of many or all, which is especially the case with commercial laws, is much to be desired and not inherently difficult of

attainment. It is along these lines that the American Bar Association and the Conference of Commissioners have directed their labors. They have not attempted to formulate codes which shall make uniform the great body of the laws of one State with those of the others, but have selected those subjects on which uniformity is most needed, —those which are most general in their application throughout the country, and have labored to secure harmony on those particular subjects.

The Conference of Commissioners has recommended a number of measures, but the most important one which has received its attention is an act on the subject of negotiable instruments. In a letter of recent date from the Hon. Lyman D. Brewster, President of the Conference of Commissioners, to the chairman of your committee, he says: "This Act, which is an Americanized form of the English Bills of Exchange Act, has been passed in New York, Connecticut, Florida, Colorado, Maryland, Virginia, Massachusetts, and the House of Representatives of Congress. It has been favorably reported to the National Senate, but the press of war measures necessitated its going over until the next session. Its passage by Congress is intended only for the District of Columbia."

When it is considered that this act was not adopted and recommended by the Conference of Commissioners until August, 1896, the progress made in procuring its enactment as law is most encouraging. This act is recommended to thirty States and one Territory by their Commissioners, and will sooner or later likely become the law of all, or certainly of a very large majority. When it does, the other States are under the practical necessity of adopting it.

Your Committee is not aware that Texas has ever taken any action on the subject of uniformity of laws. If the labors of the thirty States already engaged in that work bear the fruit they now promise, every State not adopting like reforms will find needless and vexatious obstacles and obstructions in the path of its progress. It is no argument to say that Texas is great enough to overcome them. Perhaps so, it is still unwise to pile up useless obstructions for the purpose of showing an ability to climb over them. There is perhaps no single tie between people so strong as that of similarity of laws. The nearer the laws of the several States approach uniformity, the freer and more untrammeled will be the intercourse and commerce between their citizens. Texas cannot afford to stand idly by and see the ties between its sister States grow closer and closer, while those between itself and them are not strengthened. She is fitted by nature to hold a proud place among her sisters, and it is her duty to use all honorable means to speed the realization of her rightful position.

This work of reform is a long step in the direction of legal progress and enlightenment. Texas has an intelligent bar,—one of which she is justly proud. In great legal reforms she should not follow but lead. We of the legal profession are, in common with other citizens, interested in her general welfare and prosperity, but in matters pertaining to her laws and their administration it is our especial duty to see that she is kept abreast of her most intelligent, enlightened and progressive associates.

Your committee believe that the plan of the American Bar Association above outlined is the best means that can be suggested to promote uniformity, not only in commercial law and usages, but in such other laws as it may be found desirable to make uniform. They therefore recommend that this association appoint a committee whose

duty it shall be to draft and present to and endeavor to have passed by the legislature of this State an act authorizing the appointment of Commissioners on Uniform State Laws, with powers and authority similar to those conferred on its commissioners by the States hereinbefore mentioned. Respectfully submitted,

HENRY C. COKE,
JOHN C. WALKER,
M. A. SPOONTS.

On motion of Mr. Ewing, the report was adopted.

The President then called for a report from the Committee on Criminal Law. Mr. Sinclair Taliaferro, a member of the committee, stated that the chairman, Judge John P. White, had submitted to him a synopsis of the report which was to be prepared and presented. He expected Judge White on every train, and asked for and obtained further time in which to present the report.

The Committee on Grievances and Discipline were allowed until tomorrow morning to make a report, awaiting the arrival of its chairman, W. J. McKie.

Unfinished business being in order, the report of the special committee heretofore appointed to "Investigate and Report upon the Merits of the so-called Torrens System of Registration of Land Titles" was read by the Secretary, from the printed proceedings of last session (pp. 27-32), as follows:

To the President and Members of the Texas Bar Association:

Your special committee to investigate and report upon the merits of the so-called Torrens system of registration of land titles, begs leave to submit the following:

In passing upon the merits of the system of Sir R. R. Torrens, it is required that we contrast it with our own to some extent at least. Title to land under our laws is based upon evidence of title, written or by parol. Each transfer and every transaction affecting the title to a tract of land are additional links of evidence required to be proven in making out a perfect title before a legal tribunal in case of contest of title.

If A. owns a tract of land and B. desires to purchase it, A. furnishes B. with an abstract of his title, which may contain 100 or more transfers, showing the written muniments of his title.

B. submits this to his attorney for an opinion as to the title. The attorney examines every transfer to see if each conveyance is in legal form, signed by the proper party, acknowledged, as required, and recorded. In passing judgment on this written evidence of title, many presumptions have to be indulged in, among which are that the vendee and vendor, appearing of the same name, is the same party: that ven-

dors who represent themselves to be the only heirs at law of the last vendee are such; that the consideration expressed in the deed of a married woman conveying her separate property is valuable, adequate and paid by the grantee (Sayles' Real Estate, page 840, vol. 2, citing Wiley vs. Price, 21 Texas, 637; Waltee vs. Weaver, 57 Texas, 569; Davis vs. Kennedy, 58 Texas, ——), and not less than that expressed in the deed (Cole vs. Bammel, 62 Texas, 108); that the deeds of conveyance were delivered to the vendees; that a certain person was married or not, as stated; that a party died intestate, as stated. "The legal capacity of the grantor to convey the genuineness of instruments, the identity of the persons and many other facts which are of fundamental importance to the actual validity of the title are taken for granted." So the attorney, in giving his opinion as to the title, necessarily assumes that the facts shown by the abstract are true, and that there exist no facts in parol antagonistic to the abstract, such, for instance, as an equitable title in another, or title in another, or title by possession under the Statute of Limitations (McGregor vs. Thompson, 7 Civ. App , 327; East Texas Land and Improvement Company v. Shelby, 41 S. W. R., 542), or right of homestead, etc. B. purchases A.'s land upon his attorney's opinion of the title, in every subsequent transfer the same facts must be investigated and legal opinion given, regardless of prior transfers and opinions. In case of an action to try title by or against B., then he must introduce in evidence all his muniments of title. Each has to run the gauntlet of judicial scrutiny and pleas of non est factum. If a muniment fails from defective acknowledgment or other cause, the chain of title is broken and he loses. Parol evidence may develop questions of boundary, notice, good faith, fraud, trusts, estoppel, title by statute of limitations, rights of femes covert, minority and other disabilities.

It can therefore be asserted: Under our system of land titles the validity of any title depends on the evidence to establish it that the claimant can adduce on trial in a judicial proceeding. The further a title is removed from the government, the greater the number of transfers and mutations and the more difficult it will be to establish a perfect title.

The Torrens system provides by statute for registering indefeasible titles to land, and not the evidence of title as under our system, and, having registered the title itself, to keep it indefeasible in the party shown by the certificate to be the owner of the fee. Briefly stated, the system provides: The party holding the fee simple title to land at law or in equity makes written application to the registrar to have his title registered. His application sets out his claim to title, all adverse claims, all incumbrances and charges against the land, and the boundaries, with names of adjacent land owners. The applicant accompanies his petition with an abstract of his title and all his muniments of title, together with the field notes, plat and report of the public surveyor. The registrar refers the same to a barrister and a conveyancer known as "examiners of titles." They make examination and report to the "Registrar or Recorder of titles."

(1). Whether the description of the tract of land is clear or not. (In this they call to their assistance a surveyor and draughtsman if required) (2). Whether or not the applicant is in undisputed possession of the land? (3). Whether or not he appears in equity and justice rightfully entitled to it? (4). Has he produced before them such evidence of title as shows that no other person is in position to succeed against him in an action of ejectment?

If the applicant has failed to satisfy the barrister and conveyancer, so as to make a favorable report, the application is rejected unless he be in possession and have merits, when they report and recommend that notices be served on adverse claimants, and claim advertised according to the nature of the case and the domicile of the parties likely to be interested. Notices are served on the persons in possession, upon such persons as the examiners may indicate, and upon owners and occupiers of contiguous land. The notices set forth the purport of the application, and that if objections be not made by filing caveat within the time prescribed by the registrar, the land will be brought under the law and indefeasible title granted to the applicant. If caveat be filed the registrar refers the case to the Supreme Court (Australia) upon the questions raised, and it is there tried, and when settled sent back with the decree to the registrar, who registers the title and issues certificate accordingly. If no caveat be filed the land is brought under operation of the law by the issue of certificate of title vesting the estate indefeasibly in the applicant. The certificate is in duplicate, describes the land, shows the estate of applicant, and all lesser estates, leases, charges, easements, rights, liens, or other interests affecting the land. Space is given for the indorsement of subsequent memorials, recording the transfer, and the creation, transfer or extinction of future estates, charges, liens and lesser estates.

The duplicate certificates are bound into a register and each forms a distinct folium of the register of one or more pages, for recording all dealings affecting the land, whether fee simple, lesser estate, mortgage, charge, or interest, whether subsisting at the time the certificate is issued or subsequently created. When the entire estate is transferred, a deed is prepared, executed, and the parties submit it to the registrar. If in form, he approves it and files it in his office, cancels the certificate, and writes cancelled across the face of the folium, noting the transaction, issues a new certificate to the vendee in his name, with duplicate, making a new folium, upon which, as well as the new certificate, show all the indorsements and notations of the former certificate, and memorial not cancelled. If part only of the land be transferred, the same proceeding is had as to the vendee, and the vendor procures a new certificate showing the remainder of the estate. A new folium (duplicate) is opened, showing the transaction, with all indorsements, of the old folium not cancelled, brought forward on the new certificate and folium. And so as to the new certificate and folium of the part sold.

Each certificate and its duplicate are alike numbered. All caveats and instruments affecting the land, as mortgages, liens, encumbrances and lesser estates, are filed with the registrar and noted on the certificate and folium. Indexes show all instruments filed, all certificates and duplicates and their endorsements and cancellations.

Registered estates are held subject to such charges only as appear on the folium of the register and indorsed on the certificate of title by the proprietor, but free from all other charges, estates or interests whatever.

In registering estates an indeminity fund is created by contribution of ¼d in the pound sterling of the land value (Australia: 1-10 of 1 per cent. Illinois) and held to reimburse those who are by the act of granting indefeasible titles deprived in any way of their land. This amount has been found more than sufficient where the law is in force.

The fiction of the common law mortgages is abolished. Liens and charges are in writing without conveying the land, filed with the reg-

istrar if in due form and regular, and noted on the certificate and folium. An equitable mortgage by deposit of certificate for loan of money, or security for future advances, is shown by filing a caveat forbidding any dealing with the land until a time stated, but on notice the creditor may turn his equitable mortgage into a registered charge.

When a mortgage or charge is paid, the registrar upon the receipt being filed, cancels the mortgage or charge and shows payment on folium and certificate. The proprietor can, to free his certificate and the folium from canceled charges, have a new certificate issued, and a new folium. Each new certificate refers to the old one from which it is derived. From essay of Sir Robert Torrens.

"Under this method, accumulation of instruments of the title with voluminous indices, the fatal objection to other systems, is avoided, as each separate estate, or interest in each parcel of land, is represented by one instrument only, which instrument is held by the registered proprietor, and discloses all that it may concern a party dealing with him to be cognizant of. The duplicate being filed in the registry office, searches are needless except to ascertain the non-existence of caveats or inhibitions, and even that is accomplished without reference to an index, as each instrument bears a number or symbol indicating the volume and folium of the register where the history of the title is recorded. Charges and leases are created, transferred, released, or surrendered, by brief endorsements on the certificate of title, and entry in the register." (Idem.)

"When an estate is conveyed in trust, the instrument is filed after approval with the registrar, and a caveat filed prohibiting registration of any dealing with the trustee, except by the terms of the trust or sanction of the Supreme Court." (Idem.)

In 1895, the Legislature of Illinois passed "An act concerning land titles," based on the Torrens system (Laws 1895, p. 107.) "authorizing the owner of an estate in land to apply by writing, stating certain facts to the registrar, to have his title registered (Secs. 7, 11); providing that thereupon the registrar shall cause examination to be made into applicants' title, notifying all persons appearing to have any interest in the premises Sec. 14); that if it appear to the registrar that the facts stated in the application are true, and that the applicant is the owner of the land, or interested therein, as set forth in his application, he shall issue a certificate of title, and proceed to bring the land under the operation of the act, otherwise shall dismiss application without prejudice (Sec. 15; that with certain exceptions no person, though under disability, shall bring action for recovery of land, or assert interest or right therein adversely to the title or interest certified in the first certificate bringing the land under operation of the act, unless within five years after the first registration (Secs. 29, 37)."

This act, on November 9, 1896, was by the Supreme Court of Illinois, in People vs. Chase (46 N. E. Rep., 454), declared unconstitutional, because it confers judicial powers on the registrar, in contravention of Constitution of Illinois, Article 6, Section 1, providing that judicial power shall be vested in the courts therein named. The above quotation is the syllabus of said case as reported. This Illinois law was drafted by a commission appointed for the purpose known as the "Land Transfer Commission," composed of Hons. Harvey B. Hurd, Theodore Sheldon and Willis G. Jackson. When the commissioners made their report with the bill, they accompanied it with an address setting forth the "merits" of the Torrens system.

On May 1, 1897, "An act concerning land titles" was approved by the

Governor of Illinois, and went into effect then. This law was drafted with great care, subsequent to the decision of People vs. Chase, supra, and intended to obviate the constitutional defects of the former law, and amend its provisions throughout. By Section 15, the application to bring land under the act is made to any court having chancery jurisdiction in the county where the land is situated. The court is given power to inquire into the condition of the title, and to any interest in the land, and any lien or incumbrance thereon, and to make all such orders, judgments and decrees as may be necessary to determine, establish and declare the title or interest legal or equitable, as against all persons known or unknown, and all liens and incumbrances existing thereon, whether by law, contract, mortgage, trust deed, or otherwise; and to declare the order and preferences as between the same, and to remove clouds from the title: and for that purpose, the court to be always open for such business, as well in vacation as in term time.

Section 16 provides for entering the application in "land registration docket" and for parties defendant, providing: "All other persons shall be made and deemed to be defendants by the name or designation of 'all whom it may concern.'" By Section 18, the court may refer the application to one of the examiners of titles appointed by the registrar, who examines into the title and into the truth of the matters set forth in the application, and particularly whether the land is occupied, nature of occupation, and report to the court the substance of the proof and his conclusions therefrom, with power to administer oaths and examine witnesses, and may apply to court for directions in matters under investigation by request of any party or the direction of court to report the evidence. This section provides for time of hearing and contests before the examiner. Section 19 provides for service of citation on defendants, and Section 20 for citation by publication in some newspaper, setting forth the form of notice. Section 21 provides for copies of the published notice to be mailed to defendants not served, and clerk's certificate evidence of this. Section 22 provides that answers or cross bills must be sworn to and set out the interest claimed, and full answer made to each material allegation of the application, admitting, avoiding or traversing the same, or showing some cause in law why the same need not be so admitted, avoided or traversed. The answer has no greater weight than the application. Section 23 provides for defaults.

By Section 24 the court can reject the report of the examiner and require other or further proof. Section 25 provides as to scope of the decree, vesting title, removing clouds, validity of liens, trusts, etc. Court may order the registrar of titles to register the title, and give directions as to how liens, encumbrances, etc., shall be placed on the certificate of title as to priorities. By Section 26, the decree is made binding on all persons, whether named in petition or included in "all whom it may concern," including infants, lunatics and others under disability, but such have recourse on the indemnity fund for any loss sustained. Appeal is allowed and writ of error within two years. Any interested party not actually served or notified of application or pendency thereof can file answer, and in the discretion of court may reopen, by showing party had no notice, information or belief of filing of application or pendency of proceeding until within three months of filing answer. By Section 27 all persons, because of some irregularity, insufficiency or other cause, not bound by decree, have two years from

date of decree in which to file action, and by Section 28 filing notice in registrar's office under oath is sufficient.

This act in many respects is an improvement on the Torrens law, and framed to avoid all defects by reason of the difference in the laws here and in Australia. It is intended to show on one page of the "register of titles" the exact state of the title. Notation of a lien, a caveat, a mortgage, a trust deed, an assignment, a pending suit, administration, guardianship or any matter affecting the title to the land, can be fully investigated in the registrar's office by calling for the file papers shown by the notations. When an assignee, receiver, master in chancery, special commissioner or other person appointed by a court to deal with or transfer registered lands, or interest therein, is appointed by a court, a certified copy of the order must be presented to the registrar with the duplicate certificate (the original remains in the registrar's office), if party can produce it. This order is then filed and noted. In case of sale the land cannot be conveyed until the order of the court approving the sale has been filed, which must accompany the deed, and the conveyance is then completed, the old certificate cancelled and a new one issued to the purchaser. The same proceedings are had in administrations and guardianships.

In making partition in probate court a certified copy of the order and proof of heirship made in court must be filed, which is made conclusive of heirship. Lis pendens is not notice until a certificate of the pendency of the action is filed and noted on the register. No lien or judgment exists until a certified copy of the judgment is filed with the registrar and noted on the register, and so in attachment a certificate from the officer making the levy is filed and noted before a lien attaches. There can be no lien or charge or notice affecting the land not shown on the register of title.

The Illinois statute is local option as to counties and not operative until adopted. This system has had much consideration by the profession and the law making power of Illinois, who seemed determined to frame a law that will stand the test of judicial scrutiny. We attach to this report the statute above referred to, taken from the official acts of the Fortieth General Assembly, which adjourned June 4, 1897. We also attach to our report a letter from Hon. Harvey B. Hurd, of Chicago, chairman of the land transfer commission, whose report we have referred to. Mr. Hurd has been identified, from its inception, with the move to adapt the Torrens system to the laws of Illinois, and has given it much study and attention.

We also attach to our report a letter from Judge James B. Bradwell, of Chicago, as to this law.

In making this report we have, in addition to exhibits attached hereto, examined: "An Essay on the Transfer of Land by Registration," by Sir Robert R. Torrens; "Land Transfer Reform," by John T. Hassam: "Land Transfer Registration of Title," by William D. Turner, of Boston (25 Am. Law Rev., pp. 755-775); "Land Transfer Reform," address of Charles F. Libby, Esq., President of the Maine Bar Association, 1894 (28 Am. Law Rev., pp. 196-210); "Land Transfer Reform" (editorial, 25 Am. Law Rev., pp. 806-812); "The Supposed Conclusiveness of a Land Transfer Certificate Under the Torrens System" (editorial, 27 Am. Law Rev., pp. 89-91).

In conclusion, we submit that the "merits" of the Torrens system consist in:

(1) A registered, indefeasible title of one instrument in writing,

showing on its face the owner of the fee, boundaries, every charge and lesser estate or incumbrance; cancelling all prior transactions, and providing that there is no lien, or notice, or charge, not shown by the certificate of title; this, instead of title by deed, depending on evidence written and verbal, the former accumulating by time and often dependent on the latter for support. There can be no reason why every time a conveyance is executed that it should require more evidence than before to prove up the title, nor why title to real property should ever rest in parol.

(2) The holder of the registered certificate of title has a "merchantable" title without an abstract or certificate of recorded deeds, judgments and cancelled mortgages.

(3) Having once registered the title, all adverse claims are cut off as to the past, and they cannot in the future by the statute of limitations ripen into a title.

(4) "It is only in land that the history of ownership must be investigated; and it is the doing away with the necessity of investigation into the past history of the ownership of the land that the Torrens system has accomplished."

(5) The system does not propose to turn a bad into a good title, but to allow those having good titles to procure a declaration of it, and those having defective titles an opportunity to perfect them.

(6) The practice of searching the records for defective acknowledgments, and defects in titles and in boundaries that exist from lapse of time and loss of evidence is swept away.

(7) The indemnity fund secures all persons against loss who have merits in their claim of title.

(8) The two systems can be operative at the same place at the same time, and made elective as to the land owner, as in England under Lord Cairn's act of 1875.

Respectfully submitted,

JAMES E. HILL, Chairman.
T. F. HARWOOD,
A. C. PRENDERGAST,
T. S. REESE,
N. A. RECTOR.

After considerable discussion the further consideration of the report was postponed until the next annual meeting, and the Secretary was directed ot have it republished.

The Board of Directors reported as to banquet, asking for instructions. Invitations were extended to members to visit the Garten Verein during its regular hours for receiving and entertaining tonight. The invitation was accepted with thanks, and, on motion, the association adjourned until 10 o'clock tomorrow morning.

SECOND DAY.—MORNING SESSION.

GALVESTON, TEXAS, July 28, 1898.

The Texas Bar Association was called to order at 10 o'clock a. m. by the President.

The Board of Directors made the following report:

To the President and Members of the Texas Bar Association:

Your Board of Directors have considered the applications of the following members of the bar for membership in this association: E. S. Block, Del Rio; George F. Burgess, Gonzales; T. C. Ford, Houston; F. C. Jones, Houston; T. H. Stone, Houston, and Charles B. Wood, Houston, and would recommend that the applications be granted and the applicants admitted to membership in this association.

Respectfully submitted,

T. J. BALLINGER,
M. A. SPOONTS,
F. H. WASH,
A. E. WILKINSON.
Directors.

On motion the report was received and adopted and the applicants duly elected members of the association.

The President then introduced Hon. Samuel J. Hunter of Fort Worth, who delivered the annual address, the subject being "Life Tenures of Office in a Republican Government." (See Appendix.)

The President stated that the paper just read was open for discussion.

Mr. W. W. Searcy, addressing the association, said, that with all due respect to Judge Hunter, he could not, as a member of the bar, allow the assertion made in the paper to go unchallenged, that the judiciary had no power to declare a law unconstitutional, for if that were true it would indeed place us in a state of anarchy. He wanted to open the question for discussion and made this objection now in order that other members of the bar might be heard from.

Further discussion was for the time being postponed.

The President then introduced Mr. Norman G. Kittrell, of

Houston, who read a carefully prepared paper entitled "Suggestions as to Needed Reforms in the Assessment and Collection of Taxes." (See Appendix.)

Discussion referring on the annual address of Judge Hunter, and the paper just read by Mr. Kittrell, Mr. W. S. Simpkins, of Dallas, addresssing the association, said:

"I have listened with pleasure to the paper just read by Mr. Kittrell, not only because of its well-timed and well-expressed attack upon an admitted evil in our system of taxation, but because of the fact, that it clearly shows that Judge Hunter does not practice what he preached. I am glad that Judge Kittrell, in quoting freely from Judge Hunter's opinion in the tax case cited, has given an opportunity to criticize fairly the language of Judge Hunter in his annual address reflecting upon the manner in which the Supreme Court of the United States had exercised its constitutional power in declaring acts of congress unconstitutional.

"The decision of Judge Hunter in the tax case quoted by Mr. Kittrell showed an extreme case of the exercise of judicial power in setting aside legislative action. The State legislature had positively declared that the action of the board of appraisers was to be final and the citizen was thus left to the tender mercies of an irresponsible body without right of appeal; yet Judge Hunter did not hesitate to hear an appeal and declare the particular legislation beyond the power of the legislative body, when certain conditions, as in that case, existed. Now I submit, is this action consistent with his declaration in his annual address, that the different departments of government are supreme, and declares that the supremacy extends to determining the validity of its own action free from judicial interference; and that in declaring the income tax unconstitutional the Supreme Court of the United States had invaded the right of the legislative department of determining the extent of its power of taxation.

The statement of the judge carries its own death wound. The constitutionality of an act of any other department is a legal question, and an attempt to exercise judgment touching the constitutionality of its own acts by either of the other departments is an invasion of the power of the judicial department. The honorable judge has gone too far in construing the term, "absolute independence of the departments," especially when he seeks to make it cover judicial power to determine its own acts. But, as said, my friend does not believe what he preaches; his decision in the tax case cited was eminently correct. He was then speaking as a judge fully impressed with its responsibilities, he is today tickling our ears with theory. In the one case he is pointing out a city of refuge from legislative ignorance; in the other he is undermining the foundations of the city by delivering us over to unrestrained legislation.

I am surprised also to hear the judge, in the excess of his indignation because of the action of the Supreme Court upon the income tax bill, regret that another Andrew Jackson was not in the executive chair that he might place his heel on such a decision and say to this court, "I am the president of the United States and will enforce the law in spite of you." This should not be the advice of a judge of one of our higher courts to the young men of the land; it is such disrespect of law

that leads to anarchy: it should be in the future. as it has always been in the past. that the greatest glory of the American citizen was obedience to law: and when that great court has spoken he has bowed submissively to its commands.

But. I did not rise to make a speech: my purpose was to call attention to the difference between the theory and practice of my friend. I sincerely hope. for his sake as well as the association. his reflections upon the Supreme Court of the United States will be expunged from the record. as they do not express the views or sentiments of the Bar Association of the State of Texas.

Mr. T. J. Ballinger addressing the association on the subject said:

"In some states incompatibility of temper is ground for divorce. It has been the custom of this association to print the papers in the annual report of our meetings in the order presented. I think in this instance. however. we might suspend the rule and instruct the Committee on Publication to print some paper between the annual address read by Judge Hunter and the paper read by Mr. Kittrell. and thereby divorce these papers for incompatibility of temper. I wish to repudiate what I believe to be the anarchial doctrine promulgated by Judge Hunter in his annual address. I agree with the views expressed by Mr. Simkins. and desire to say if the lawyers of this State. who have been honored by the people. at whose shrine Judge Hunter says he worships. teach that the decisions of our courts. whether composed of life term judges or judges elected for two. four or six years,—which don't agree with the views of the majority of the people, are to be met as it were. at the point of a bayonet. it would give the litigant a right to bayonet the judicial officer who renders a decision against him. I am inclined to think that such an expression eminating from or such views entertained by a judge of one of our higher courts, comes with decidedly bad grace and should not meet with the approval of this association. and I desire to enter. on behalf of the younger members of this association. a protest against the even quasi adoption of such a doctrine of anarchy and bloodshed against the judiciary of America."

Judge J. N. Henderson, of the Court of Criminal Appeals, said:

"The address of Judge Hunter has been alluded to as in the nature of a joke. I believe Judge Seymour D. Thompson, of St. Louis, some two years ago delivered himself of an extended criticism of the Supreme Court of the United States, but subsequently. in some review, he attempted to say it was more or less of a joke. I cannot entirely concur with the points set forth in Judge Hunter's address. They are questions purely political.

"Speaking of the co-ordinate branches of the government, there are instances where their jurisdiction is supreme; for instance, in the matter of passing upon the qualifications of its members the legislature is the sole judge. I understand, however, that in our system of government the supreme law of the land is the constitution, and it re-

solves itself into the simple proposition whether we would have one man construe that constitution or whether a learned body of lawyers composed of nine men should do it. For myself, I am in favor of the nine. I am in favor of giving the interpretation of the constitution to such a tribunal and not to a one man power. Now, the question of tenure is a very grave one; something can be said on both sides of it. I am impressed with the opinion that we are doing very well. Of course some mistakes have been made,—no human institution has proven infallible, but in the long run, as a final test, as the final construing body of the provisions of our constitution I am in favor of the Supreme Court of the United States, a supreme judicial body, interpreting it for me."

Mr. Presley K. Ewing said:

"The view of the constitutional interpretation advanced by Judge Hunter was that entertained by some of the early patriots of this country; and in so far, the severe reflections on his address seem to me intemperate and uncalled for. But the question in favor of the contrary view, has certainly been forever set at rest; and for my part, I deprecate and disapprove as unjust and undeserved, his attacks upon the Supreme Court in relation to the interpretation of law by that body. I do so, earnestly believing in the minority view as to the income tax, but standing ready to bow to the law of the majority while it remains law. The legislative department is supreme in its sphere of making law, the executive in its domain of enforcing law, and the judiciary is essentially supreme in its function of interpreting and declaring law. This is what the court did in the income tax case. Nor am I less a Jeffersonian democrat for these views, because I do not understand that Jefferson or Jackson ever conceived the ideas imputed to them by Judge Hunter. Jefferson held to the co-ordination of the departments of government; and hence, in pardoning men convicted on a law deemed by him unconstitutional, he was merely exercising an independent prerogative of the executive, infringing on no judicial right and needing no judicial aid. In so far it may be true that the two departments, in constitutional construction, are independent each of the other, but it is a confusion of thought to apply such illustration to a case, as the income tax case, which would involve a practical undoing and defiance of the judiciary's declaration of law. There could not be in a government at peace, one law for the judiciary and another for the executive, in a matter where private rights of property lay in the background. As to the tenure of the federal judiciary, this is a serious and debatable question. I incline to the fear of Thomas Jefferson that the germ of dissolution of this government, if there be one, lies in the irresponsibility to the people of the federal judiciary, arising from life tenure. There are evils in both life and term tenure; but, on the whole, I rather favor, with proper safeguards, the term tenure. However that may be, there ought never in reason to have been any question, and such silenced question ought not now to be revived, as to the right of the judiciary to authoritively interpret and declare the law; and hence to pronounce still-born a legislative enactment that is thought to be at war with the Constitution, the fundamental compact of the people's reserved rights."

Mr. Robert G. Street said he thoroughly approved every sentiment uttered by Judge Hunter in his address, and approved the emphatic language used, and if the members of this association will permit their minds to recur to the drift and tendency of opinion against the views of the writer, they will see that strong speech is necessary to arrest it. Continuing he said:

"Where in the constitution is found warrant for the Supreme Court to declare a law unconstitutional. It is the province of the courts to decide cases between parties and not to declare what the constitution means as binding on other departments of the government. Nothing but the ultra conservatism, not to say judicial fetchism, of the profession could have encouraged the growth of the idea that the court has such right. The judges may say in their opinions that a law is unconstitutional, but to claim that such opinions are binding on other co-ordinate departments of the government, or that the law is rendered thereby unconstitutional in fact, and is without force, the same as though repealed by statute, is absurd.

"You may, to sustain yourselves in your position, appeal to reverence for the judiciary, but there is no warrant for the position in the history of the origin of the government nor in the constitution. Gentlemen, you may criticise the strong language employed by Judge Hunter, but his expressions are not stronger than those of Jefferson, nor those of Judge White in his dissenting opinion in the income tax case. In Pollock vs. Farmers Loan & Trust Co., 157 U. S., Judge White said he foresaw that the judgment of the majority of the court might involve this country in anarchy and bloodshed. The views of the writer are in the line of progress; they will continue to advance, slow though it be. With increasing years I have sought to divest myself of prejudice and too great an adherence to traditions. We all possess the defects of our own qualities. This is the fault engendered by our profession. Keep abreast of the times. No one can contend that the constitution has not been undergoing a strain by forced construction. The decision in the income tax case was the indirect reversal of five decisions running through a period of 100 years. I do not charge that this change proceeded from corruption, but the judges are too prone to be on the side of power. It was manifest that this income tax case was a moot case gotten up through the collusion of a corporation and a stockholder in the corporation. He represented that the corporation was about to pay the tax, to his damage, and he prayed that it be restrained from so doing. It was a fraudulent case and should have been thrown out of the court.

"I am aware the sentiment of the bar is against the views I advocate, but the tendency of the best thought of the country is against the majority of the bar, whose views proceed from ultra conservatism. I do not wish to be understood as holding that in a particular case a law cannot be declared unconstitutional in its application to that case, but I do hold that it has no binding force upon the successors in that court, nor upon the other branches of the government. The courts do not declare the statutes constitutional or unconstitutional. They decide the case, and comments upon the unconstitutionality of the law, are simply a part of their reasoning or argument. If the functions performed by Congress, by the President, and by the courts are

respectively legislative, executive and judicial, so long as neither invades the province of any other, it is acting within its appropriate sphere; and whether wisely or unwisely, constitutionally or unconstitutionally, so far as affects its own action, it is itself the exclusive judge. The judiciary can no more annul an act of Congress on the ground of its unconstitutionality than Congress can set aside a decree of the courts because without jurisdiction. It is, perhaps, in this independency of opinion and of action with respect to the scope and limitations of constitutional power; this separate right and duty of each of the co-ordinate departments; this requirement that each shall view and determine these grave questions for itself, and neither for the other, from its own point of view, and upon its own responsibility, under the influences and by the processes of reasoning peculiar to each, that the greatest safeguard is to be found at once against the tyranny of political assemblies, the ambition of an executive, and the rigidity of the non-progressive and inelastic rules and principles that in general control judicial decision."

Mr. Dillard: How then would you say a constitutional question could ever be settled?

Mr. Street: "No question of the grant, reservation, or prohibition of sovereign power or declaration of public policy should ever be considered settled until uniformity of opinion and action has been reached by the several departments, and not then until the people have made known, under circumstances and conditions favorable to its exercise and through such time as to assure deliberation, their approval of such concurrence. And this concurrence itself, to be binding, must be reached under the free exercise of the right of independent opinion and action, and not through the influence of the gross delusion that ity.' If it be further objected that beneficial results can only be hoped the courts speak on the subject 'with the voice as of one having authorfor from this process of voluntary adjustment at the end of a long period of conflict and travail, I reply, that no truly beneficial results in the world's history—physical, social, moral, or governmental—were ever achieved by 'happy accidents;' and if the period of attainment of these results be deferred, it is because their right development requires it; and dissatisfaction on that account is only a renewed expression of the impatience of man with the slow processes of God and Nature."

At the conclusion of Mr. Street's remarks, the association, on motion of Mr. Kittrell, adjourned until 3 o'clock p. m.

SECOND DAY.—Evening Session.

The meeting was called to order at 3 o'clock by the president.

The board of directors reported favorably upon the applications for membership of W. S. Hunt and Jacob C. Baldwin, of

Houston, and they were duly elected members of the association.

Mr. F. Chas. Hume, for the committee on jurisprudence and law reform, made the following report:

Hon. Wm. Aubrey, President Texas Bar Association:

At the last session of the association was submitted a most interesting and important report by the Committee on Jurisprudence and Law Reform. The report recommended many vital amendments and additions to the statutes, was wide in its scope and elicited much discussion. Some changes and substitutions were ordered by the association, and the report, as amended and substituted, was adopted—save the first section, which was referred to the committee for its further consideration, and with the request that it report a new section reflecting the views of the majority of the members present, as developed by the debate.

The committee at a subsequent day of the session reported as theretofore directed, a substitute for the first section, and thereupon it was ordered by the association that the report be received, published and its consideration deferred until the present session.

Whether this disposition of the supplementary report had the effect to open to discussion, rejection or change that part of the original report which had been, after amendment, adopted, the present committee is in doubt; but whether so or not by parliamentary usage, we do not question the power of the association to reconsider now so much of the report as was then adopted.

We do not question that the association has as much power to reconsider now so much of the report as was then adopted as it has to express its will as to the first section submitted to it by the supplementary report of the former committee.

The present committee are, moreover, of the opinion that the attention and interest of the legislature in reforms proposed by the association is far more certain to be engaged when such reforms are persistently and continuously urged by the association.

For these reasons, among others, we believe it the wiser course to make at this time no further specific recommendations, but, instead, to invoke the careful consideration and disposition of the matters now before the association through the painstaking and thoughtful labor of our predecessors. Very respectfully,

F. CHARLES HUME,
JOHN G. TOD,
For Committee on Jurisprudence and Law Reform.

On motion the report as read was adopted.

The Secretary was directed to have a corrected program of the proceedings adopted for the third day's session, published in the papers tomorrow morning.

Mr. B. R. Webb, of Fort Worth, was then introduced and read a paper entitled "A Review of Recent Noteworthy Decisions of the Higher Courts of Texas." (See Appendix.)

The time having arrived for the excursion and banquet on the gulf, the association adjourned until tomorrow morning at 9:30 o'clock, and the members proceeded in a body to the wharf and embarked on the steamer, on which an excellent repast was served and music furnished, returning to the city about 8:30 o'clock p. m.

THIRD DAY—Morning Session.

GALVESTON, TEXAS, July 29, 1898.

The association was called to order at 9:30 o'clock a. m., by President Aubrey.

The Board of Directors reported favorably upon the applications of Robert H. Connerly, of Austin, and McDonald Meachum, of Navasota, and on motion the report was adopted and the applicants duly elected members of the association.

President Aubrey then introduced Judge George E. Miller, of Wichita Falls, who read a carefully prepared paper on "Some Features of the Uniform Bankruptcy Law." (See Appendix.)

Mr. Hill read a telegram just received by him from Judge Hurd, of Illinois, stating that the suit to test the validity of the Torren's Land System act had not yet been decided, but a decision is expected in October.

The President then introduced Hon. Jonathan Lane, of LaGrange, who read to the association a paper entitled "Our Courts." (See Appendix.)

Mr. W. A. Kincaid, of Galveston, was then introduced by the President, and read a paper entitled "In the Known Certainty of the Law is the Safety of All." (See Appendix.)

The Committee on Judicial Administration and Remedial Procedure, through Mr. Ballinger, reported that Mr. McLeary, the chairman of the committee, was in Cuba in the service of his

country, and asked that the committee be excused from making a written report. Request granted.

Mr. Sinclair Taliaferro, of the Committee on Criminal Law read a telegram from Chairman John P. White, stating that he could not be present with a report on account of sickness. Mr. Taliaferro said he knew Judge White had outlined a report, and he suggested that he be allowed to file it later and that it be published and open for discussion at the next annual meeting. So ordered.

The Committee on Deceased Members, through its chairman, Norman G. Kittrell, presented the following report:

Honorable Wm. Aubrey, President Texas Bar Association:

Since the last meeting of this association the following members have passed away:

M. Looscan, Houston, Texas, September 7th, 1897.
M. D. Herring, Waco, Texas, November 27th, 1897.
N. G. Shelley, Austin, Texas, January 5th, 1898.
R. H. Phelps, LaGrange, Texas, March 25th, 1898.
O. M. Roberts, Austin, Texas, May 19th, 1898.
B. T. Masterson, Jr., Galveston, Texas.

It will be seen that the aim of the relentless archer has been high and that before his unerring shaft, not only those ripe in years and rich in honors have fallen, but that one in the flush and bouyancy of youth is numbered among his victims.

When death touched to sleep Michael Looscan, a whole-souled, generous and chivalric son of Erin passed from the scenes of earth. In every field of action he measured up to the stature of a royal manhood. A soldier in the ranks of the grey battalions he dared death on many a hard fought field and returned to the walks of peace, broken in fortune, and face to face with a dark and foreboding future. His indomitable courage proved, however, equal to every emergency, and though buffeted by the waves of adverse fortune he steadily found his way into the confidence and esteem of his professional brethren and his fellow citizens, and dying left to the noble woman whose devotion had brightened and sweetened his life, and to a host of sorrowing friends the memory of a noble, unselfish and honorable life.

M. D. Herring had passed the three score years and ten alloted to man by the psalmist, and in the course of his long and eventful life has left the impress of his legal learning and tireless energy upon the era in which he lived. For many years the firm of Coke, Herring & Anderson was conspicuous and foremost among the legal firms of Texas, which was not surprising in view of the fact that rarely have three men of such marked legal ability been associated in the practice of law. They were all men of more than ordinary talent and the reports of the Supreme Court of Texas attest that the opinions of Richard Coke will ever be a guide and land mark to the seeker after legal light. The firm of Herring & Kelly stood abreast of the best at

the bar of Waco, a bar second to none in Texas, and no further proof of the ability or character of Major Herring is needed. Possibly no man in Texas was more thoroughly versed in the mysteries and ceremonies of the ancient and honorable order of Odd Fellowship than was he, and his place in that worthy order will be difficult to fill. Its sublime precepts he sought to illustrate in his daily walk and conversation, and with the ceremonies prescribed by its exalted ritual he was laid to rest in that city of the dead where sleep his noble compeers, friends and neighbors, Coke, Ross and others who like him contributed to the prosperity and glory of Texas of which he was an esteemed and honored citizen.

Nathaniel G. Shelley held an exalted position both in the ranks of the legal profession and of the order of Odd Fellowship. At an early age he was chosen Attorney General of Texas and discharged the duties of that high trust with fidelity and ability. For many years after his retirement from that position he pursued the practice of his profession in the city of Austin, retaining always a place in the front rank, and for a large part of the time was associated with some of the most eminent members of the bar. His intercourse with his professional brethren and the courts was marked with the courtesy and kindness of the true gentleman, and he left behind him the memory of a gracious and gentle personality and the record of an able and honorable member of the profession, which he worthily adorned.

Though maimed, and "broken and seamed with many a scar," a constant sufferer from wounds received in the very forefront of battle, R. H. Phelps possessed a mind clear, logical and vigorous, and a heart at once tender and heroic, and for nearly three score years he went in and out before his fellow men "wearing the white flower of a blameless life." He was as courageous in the advocacy of his client's cause at the bar, as he was in the defense of his country on the field of battle, and his robes of office as minister of justice were as stainless as was the sword which in his hand so often gleamed amid the battle's leaden hail. He was intensely devoted to all the memories that cling and cluster about a fallen but glorified cause, and he esteemed as the highest honor ever conferred upon him his election as commander in chief of the United Confederate Veterans of the division of Texas.

Though the wounds that left him sorely maimed and rendered him a cripple for life were outwardly healed, yet they proved a constant drain upon his strength and he died as surely a martyr to duty as a soldier, as if he had fallen in the battle's front.

Chivalrous, courageous, knightly Phelps! Thou has passed over the river to join Boone, Coke, Ross, Winkler and other heroes, who but a little while preceded thee, but thy memory will be cherished by thy professional brethren, while many a comrade who shared with thee the dangers and glories of the battle field will upon thy resting place drop the tribute of a tear.

It is manifestly impossible in this report to do even approximate justice to the deeds, services and character of Oran Milo Roberts. The events of a life marked by such long and varied service to Texas cannot be worthily treated within the limits necessarily imposed on your committee, and the privilege will be reserved to adopt so much as may be deemed proper of the able paper on the "Life and Service of O. M. Roberts," prepared for a recent issue of the Texas Quarterly by that scholarly and accomplished writer, Hon. Dudley G. Wooten, and

the same will be made a part of this report and be furnished herewith to the secretary before the proceedings are ready for publication.

Soldier, jurist, publicist, philosopher and sage, Oran M. Roberts left an indelible impression upon the pages of Texas history, and the development of Texas jurisprudence will be fully disclosed when the story of his lifework is properly told.

He illustrated as few men did that public office is a public trust and in every station wherein he served he left the record not only of pre-eminent intellectual power, but of stainless integrity.

Simple, honest and unpretentious he discharged every public duty with ability and fidelity, and no further evidence of his intellectual vigor and his ability as a writer is needed than is furnished by his opinions contained in the Texas Reports. His opinion especially on the motion for re-hearing in the case of Duncan vs. Magette is not only leading authority on the question of offset and reconvention but is a legal and literary classic.

As Governor he grasped the helm of the ship of State with a master hand and steered it amid the shoals and rapids of troubled waters to a port of safety and security. His name is indissolubly linked with the glory of Texas, and the brightest pages in her history are those whereon are graven the record of his deeds.

Branch T. Masterson, Jr., following the example of his worthy father, became a member of this body at the first meeting after his admission to the bar. He was on his maternal side a grandson of a lawyer whose name is associated with the earliest stages of the development of the jurisprudence of Texas, the late James Wilmer Dallam, and on his paternal side his grandfather, father and several uncles were lawyers. He had been thoroughly trained and educated for the profession and stood on the threshold of what promised to be a successful career, when suddenly, in the twinkling of an eye, he was stricken by the hand of death, and a young life, rich in promise, was ended ere the sun of his manhood had touched its noon.

Cultured and possessed of all the graces that are born of noble blood and gentle breeding he was the hope and joy and comfort of devoted parents, to whom in their time of sorrow, there went out from many a heart deep and tender sympathy.

This brief tribute to those of our brethren who have within the compass of a few months passed "to where beyond these voices there is peace" is submitted with the consciousness of its many imperfections, but with the hope that its sincerity may atone for its deficiencies.

The report was adopted by a rising vote and in silence.

The Board of Directors reported favorably on the applications of M. S. Cooper, of Conroe, and Charles Frenkel, of Galveston, and they were duly elected to membership.

On motion of Mr. Kittrell it was ordered that so long as any member of the association was absent, serving his country in the army, his name be carried on the rolls without payment of dues.

In compliance with the terms of the resolution adopting the

report of the Committee on Commercial Law, and providing for a committee to wait upon the legislature and ask it to pass a law providing for commissioners to act in connection with the commission of the American Bar Association, which is working for uniform laws, President Aubrey appointed as that committee Hon. Presley K. Ewing, of Houston, Henry C. Coke, of Dallas, and Robert G. Street, of Galveston.

The annual election of officers resulted as follows: F. C. Dillard, of Sherman, President; Presley K. Ewing, of Houston, Vice-President; Charles S. Morse, of Austin, Secretary, and Wm. D. Williams, of Fort Worth, Treasurer.

President Aubrey appointed H. C. Carter and M. A. Spoonts a committee to escort President-elect Dillard to the chair.

Delegates to the American Bar Association were elected as follows: T. J. Ballinger, Edward F. Harris, M. A. Spoonts and R. Waverly Smith.

On motion of R. E. Knight the President was added to the committee.

Galveston was selected as the place, and the last Wednesday in July, 1899, as the time for holding the next annual meeting.

Mr. J. Z. H. Scott, addressing the association, said there would be two steam yachts at the wharf at foot of Tremont street at 1:30 p. m., fully stocked and equipped with wines, cigars, fishing tackle, bait, etc., in readiness to take the members of the association on a fishing trip and pleasure excursion down the bay, and he invited, and earnestly hoped every member would go.

On motion of Mr. Bryant the invitation was accepted and the thanks of the association tendered.

On motion of Judge Sam J. Hunter, of Fort Worth, a vote of thanks was unanimously tendered the members of the Galveston bar for the courteous treatment and many entertainments provided for the members of the association, after which the association adjourned.

CHARLES S. MORSE,
Secretary.

OFFICERS AND COMMITTEES.

FRANK C. DILLARD.....*President*..... Sherman
PRESLEY K. EWING.....*Vice-President*..... Houston
CHARLES S. MORSE.....*Secretary*.....Austin
WM. D. WILLIAMS.....*Treasurer* .....Fort Worth

BOARD OF DIRECTORS.

T. J. Ballinger.....Galveston
M. A. Spoonts.....Fort Worth
W. C. Oliver.....Houston
T. H. Wash.....San Antonio
A. E. Wilkinson.....Austin

Committee on Jurisprudence and Law Reform.

R. L. Batts.....Austin
Carlos Bee.....San Antonio
Beauregard Bryan.....Brenham
John L. Peeler.....Austin
L. A. Carlton..... Hillsboro

Committee on Judicial Administration and Remedial Procedure.

Leo N. Levi.....Galveston
Edwin B. Parker .....Houston
R. A. Greer.....Beaumont
W. A. Wright.....San Angelo
Sam R. Scott..... Marlin

Committee on Legal Education and Admission to the Bar.

J. E. Cockrell.....Dallas
Geo. E. Miller.....Wichita Falls
Hiram Glass..... Texarkana

B. H. Rice.....Marlin
T. H. Stone.....Houston

Committee on Commercial Law.

Henry W. Lightfoot.....Paris
James L. Autry.....Corsicana
H. G. Evans.....Bonham
S. P. Greene.....Fort Worth
Chas. S. Todd.....Texarkana

Committee on Grievances and Discipline.

R. E. L. Knight.....Dallas
W. W. Turney.....El Paso
James E. Hill, Jr.....Livingston
J. D. Childs.....San Antonio
Chas. C. Cobb.....Dallas

Committee on Criminal Law.

E. J. Simkins.....Corsicana
D. A. Nunn, Jr.....Crockett
E. B. Perkins.....Greenville
I. M. Standifer.....Denison
T. S. Henderson.....Cameron

Committee on Deceased Members.

N. G. Kittrell.....Houston
F. C. Proctor.....Victoria
Thos. McNeal.....Gonzales
W. W. Searcy.....Brenham
Chas. S. Morse.....Austin

Committee on Publication.

John C. Townes.....Austin
L. J. Storey.....Lockhart

H. C. Carter.....San Antonio
Robt. G. West.....Austin
Edgar Watkins.....Houston

Delegates to American Bar Association.

Edward F. Harris.....Galveston
T. J. Ballinger.....Galveston
M. A. Spoonts.....Fort Worth
R. Waverly Smith.....Galveston
Frank C. Dillard.....Sherman

[NOTE.—The President of the Association desires that the Chairman of each committee put himself in communication at once with each member of his committee, and that each committee begin without delay to prepare the material for a report. The selection of the committee has been made with the expectation and belief that each member of each committee will not only discharge the full measure of his duty in making a report, but that he will be personally present at the next annual meeting.]

ROLL OF MEMBERS.

Abbott, Jo.....Hillsboro
Alexander, L. C.....Waco
Alexander, W. M.....Dallas
Aldredge, George N.....Dallas
Allen, W. H.....Terrell
Anderson, W. W.....Velasco
Armstrong, G. W.....Fort Worth
Atlee, E. A.....Laredo
Aubrey, Wm.....San Antonio
Austin, W. T.....Galveston
Autry, James L.....Corsicana
Avery, J. M.....Dallas

Baker, A. J.....San Angelo
Baker, Jas. A., Jr.....Houston
Baldwin, J. C.....Houston
Ball, F. W.....Fort Worth
Ball, Robert L.....San Antonio
Ball, T. H.....Huntsville
Ballinger, Thos. J.....Galveston
Barttlingck, Alex.....Houston
Batts, R. L.....Austin
Beall, T. J.....El Paso
Bee, Carlos.....San Antonio
Bell, A. J.....Karnes City
Bennett, Grant R.....Galveston
Blake, S. R.....Bellville
Blanding, J. M.....Corsicana
Bliss, Don A.....Sherman
Block, E. S.....Del Rio
Board, A. G.....Bryan
Branch, E. C.....Nacogdoches
Brooks, S. J.....San Antonio
Brooks, W. S.....Brazoria
Brown, T. J.....Sherman
Brown, R. L.....Austin
Bryan, Beauregard.....Brenham
Bryan, Lewis R.....Angleton
Bryant, J. D.....Richmond
Buckler, C. N.....El Paso
Burges, A. R.....San Angelo
Burges, R. F.....El Paso
Burgess, George F.....Gonzales
Burns, W. T.....Houston
Butler, J. E.....Bryan

Callaghan, Bryan.....San Antonio
Cantey, S. B.....Fort Worth
Carlton, L. A.....Hillsboro
Carrigan, A. H.....Wichita Falls
Carr, J. S.....San Antonio
Carswell, R. E.....Decatur
Carter, A. M.....Fort Worth
Carter, H. C.....San Antonio
Charlton, Wm.....Dallas
Chesley, A.....Bellville
Chester, L. F.....Beaumont
Childs, J. D.....San Antonio
Clark, George.....Waco
Clark, John H.....San Antonio
Clark, William H.....Dallas
Clements, William R.....Houston
Clifton, L. C.....Farmersville
Cline, Henry.....Houston
Cline, Henry Ben.....Houston
Cobb, Charles C.....Dallas
Cochran, T. B.....Austin
Cockrell, Joseph E.....Dallas
Coke, Henry C.....Dallas
Conner, T. H.....Eastland
Connerly, R. H.....Austin
Cooper, M. S.....Conroe
Crawford, M. L.....Dallas
Crawford, W. L.....Dallas
Crenshaw, Charles.....Sherman
Crisp, J. C.....Beeville
Croft, William.....Corsicana
Culberson, Chas. A.....Dallas

Davidson, R. V.....Galveston
Davis, Geo. W.....Dallas
Davis, L. B.....Cleburne
Denman, L. G.....San Antonio
Denson, W. B.....Galveston
Dennis, Isaac N.....Wharton
Dibrell, J. B.....Seguin
Dillard, F. C.....Sherman
Dodd, Thomas W.....Laredo
Dowell, John.....Austin
Dudley, J. G.....Paris
Duff, F. J.....Brazoria
Duncan, John M.....Tyler
Duncan, John T.....LaGrange
Dyer, John L., Jr.....Waco

Edwards Peyton F.....El Paso

Evans, H. D.....Bonham
Ewing, Presley K.....Houston

Fickett, Fred W.....Galveston
Finlay, Quitman.....Galveston
Finley, N. W.....Dallas
Fisher, Sam R.....Austin
Flood, W. W.....Wichita Falls
Fontaine, Sidney T.....Galveston
Ford, T. W.....Houston
Ford, T. C.....Houston
Foster, Arthur C.....Haskell
Franklin, Thos. H.....San Antonio
Freeman, T. J.....Dallas
Frenkel, Charles.....Galveston
Fulton, Marshall.....Mason
Fulmore, Z. T.....Austin
Furman, John M.....Belton

Gaines, R. R.....Paris
Gano, W. B.....Dallas
Garrett, C. C.....Brenham
Garwood, H. M.....Bastrop
Giles, W. M.....Mineola
Gilbert, Joseph E.....Greenville
Glass, Hiram.....Texarkana
Gould, R. S., Sr.....Austin
Granberry, M. C.....Austin
Green, John A.....San Antonio
Greene, S. P.....Fort Worth
Greer, R. A.....Beaumont
Grempczynski, C.....Galveston
Gresham, Walter.....Galveston
Gresham, Walter, Jr.....Galveston
Grimes, S. F.....Cuero
Groce, G. C.....Waxahachie
Guinn, J. D.....San Antonio

Hall, J. M.....Cleburne
Halbert, J. L.....Corsicana
Harrington, J. A.....Galveston
Harris, A. J.....Belton
Harris, Edward F.....Galveston
Harris, John Charles.....Galveston
Harris, J. L.....Dallas
Harris, Theodore.....San Antonio
Harvey, J. D.....Hempstead
Harwood, T. F.....Gonzales
Hawkins, E. A., Jr.....Galveston
Hefley, W. T.....Cameron
Henderson, John N.....Bryan
Henderson, N.....Wichita Falls
Henderson, T. S.....Cameron
Henry, John L.....Dallas
Henry, W. T.....Dallas
Hicks, Yale.....San Antonio
Hill, James E., Sr.....Livingston
Hill, James E., Jr.....Livingston
Hill, R. J.....Austin
Hill, W. L.....Huntsville
Hogg, J. S.....Austin
Hogsett, J. Y.....Fort Worth
Holland, J. A.....Orange
Holland, W. M.....Houston
Houston, A. W.....San Antonio
Houston, Reagan.....San Antonio
Huff, S. P.....Vernon
Hughes, W. E.....Dallas
Hume, F. Charles.....Galveston
Hunt, W. S.....Houston
Hunter, Sam J.....Fort Worth
Hurt, J. M.....Dallas

James, Ashby S.....Austin
James, John H.....San Antonio
Jennings, Hyde.....Fort Worth
Jester, C. L.....Corsicana
Johnson, Byron.....Galveston
Johnson, Marsene.....Galveston
Jones, F. C.....Houston

Kelley, G. G.....Wharton
Kelso, Winchester.....Eagle Pass
Key, W. M.....Austin
Kincaid, W. A.....Galveston
King, W. W.....San Antonio
Kirlicks, John A.....Galveston
Kisch, Seymour.....Galveston
Kittrell, N. G.....Houston
Kleberg, M. E.....Galveston
Kleberg, Rudolph.....Cuero
Knight, R. E. L.....Dallas
Lancaster, J. E.....Waxahachie
Lane, Jonathan.....LaGrange
Lee, Charles K.....Galveston
Lewis, Perry J.....San Antonio
Levi, Leo N.....Galveston
Lightfoot, H. W.....Paris
Lindsley, Philip.....Dallas
Lipscomb, A. D.....Crockett
Lockhart, William B.....Galveston
Lovett, R. S.....Houston
Looscan, M.....Houston
Lovejoy, John.....Galveston
Lumpkin, S. H.....Meridian

Malevinsky, M. L.....Galveston
Mann, George E.....Galveston
Marshall, Eugene.....Dallas
Martin, Thos. P.....Fort Worth
Masterson, B. T.....Galveston
Maxey, T. S.....Austin
McCampbell, Jno. S.....Corpus Christi
McClellan, E. D.....Bonham

McCormick, A. P.....Dallas
McEachin, J. S.....Richmond
McKie, W. J.....Corsicana
McKinney, A. T.....Huntsville
McKinnon, A. P.....Hillsboro
McLean, W. P.....Fort Worth
McLeary, J. H.....San Antonio
McMahon, J. B.....Temple
McNeal, Thomas.....Gonzales
Meachum, McDonald.....Navasota
Miller, Geo. E.....Wichita Falls
Miller, James F.....Gonzales
Miller, T. S.....Dallas
Minor, F. D.....Galveston
Montrose, T. D.....Greenville
Moody, L. B.....Houston
Moore, W. F.....Cundiff
Morris, F. G.....Austin
Morgan, Richard.....Dallas
Moseley, A. G.....Denison
Mott, M. F.....Galveston

Neal, George D.....Navasota
Nichols, Joseph F.....Greenville
Norton, J. R.....San Antonio
Nunn, D. A., Jr.....Crockett

O'Brien, Geo. W.....Beaumont
Oeland, I. R.....Dallas
Oliver, W. C.....Houston
Onion, J. F.....San Antonio

Padelford, S. C.....Cleburne
Parker, Edwin B.....Houston
Parker, John W.....Taylor
Paschal, Thos. M.....San Antonio
Pearson, D. R.....Richmond
Peeler, John L.....Austin
Perkins, E. B.....Greenville
Perryman, Sam R.....Houston
Peticolas, W. M.....Victoria
Plowman, Geo. H.....Dallas
Pool, R. B.....Cameron
Prather, Wm. L.....Waco
Prendergast, A. C.....Waco
Proctor, F. C.....Victoria
Proctor, D. C.....Cuero

Rainey, Anson.....Waxahachie
Randle, E. B.....Fort Worth
Rector, N. A.....Austin
Reese, T. S.....Velasco
Rice, B. H.....Marlin
Robertson, James M.....Meridian
Routledge, James.....San Antonio
Robson, W. S.....LaGrange

Sampson, Alex.....Galveston
Sayers, J. D.....Bastrop
Scott, J. Z. H.....Galveston
Scott, James C.....Fort Worth
Scott, Sam R.....Marlin
Searcy, W. W.....Brenham
Sehorn, John.....San Antonio
Sexton, Frank B.....El Paso
Shaw, W. N.....Houston
Shepard, Seth.....Dallas (Washington)
Simkins, E. J.....Corsicana
Simkins, W. S.....Dallas
Sinks, Ed. R.....Giddings
Smith, R. W.....Galveston
Smith, Tillman.....Fort Worth
Smith, T. S.....Hillsboro
Spence, W.....Dallas
Spence, Joseph, Jr.....San Angelo
Spencer, F. M.....Galveston
Spoonts, M. A.....Fort Worth
Standifer, I. M.....Denison
Stayton, Robert W.....San Antonio
Stewart, John S.....Houston
Stewart, Maco.....Galveston
Stone, T. H.....Houston
Storey, L. J.....Lockhart
Street, Robert G.....Galveston
Streetman, Sam.....Cameron
Stubbs, James B.....Galveston

Tackaberry, John.....Houston
Taliaferro, Sinclair.....Houston
Tarlton, B. D.....Fort Worth
Teichmueller, H.....LaGrange
Temple, Wm. S.....San Antonio
Terrell, A. W.....Austin
Terrell, J. O.....San Antonio
Terry, J. W.....Galveston
Thomson, Thad A.....Austin
Thompson, William.....Dallas
Thornton, Tom C.....Greenville
Tod, John G.....Houston
Todd, Charles S.....Texarkana
Tolbert, James R.....Vernon
Tomkins, Arthur C.....Hempstead
Townes, John C.....Austin
Trice, Mann.....Dallas
Tucker, Chas. Fred.....Dallas
Turney, W. W.....El Paso

Vining, Will L.....Austin

Walker, Jno. C.....Galveston
Wash, T. H.....San Antonio
Watkins, Edgar.....Houston
Watts, A. T.....Dallas
Waul, T. N.....Galveston

Wear, W. C.....Hillsboro
Webb, B. R.....Fort Worth
West, Robert G.....Austin
West, Thos. F.....Fort Worth
Wheless, J. S.....Galveston
White, John P.....Austin
Whitman, M. J.....Rusk
Wilkinson, A. E.....Denison
Williams, Chas. S.....Caldwell
Williams, Eugene.....Waco
Williams, F. A.....Galveston
Williams, Wm. D.....Fort Worth
Willie, A. H.....Galveston
Willie, Walter L.....Galveston
Wilson, Wm. H.....Houston
Winter, John G.....Waco
Wood, Chas. B.....Houston
Wood, J. H.....Sherman
Wozencraft, A. P.....Dallas
Wren, C. C.....Galveston
Wright, W. A.....San Angelo
Wurzbach, W. A.....San Antonio
Wynne, R. M.....Fort Worth

Young, John L.....Dallas

DECEASED MEMBERS.

ADAMS, Z. T., Kaufman. Died January 9, 1886.
ANDERSON, JAS. M., Waco. Died June 3, 1889.
ANDREWS, A. W., Terrell. Died February 15, 1887.
ARCHER, OSCEOLA, Austin. Died April, 1898.
AUSTIN, WM. J., Denton. Died September 7, 1888.

BAKER, JAMES A., SR., Houston. Died February 23, 1897.
BALLINGER, W. P., Galveston. Died January 28, 1888.
BASSETT, B. H., Dallas. Died July 15, 1893.
BLEDSOE, D. T., Cleburne. Died July 1, 1893.
BONNER, M. H., Tyler. Died November 25, 1883.
BOTTS, W. B., Houston. Died March 7, 1894.
BRADLEY, L. D., Fairfield. Died October 6, 1886.
BRADSHAW, C. J., La Grange. Died June 13, 1888.
BURGES, W. H., Seguin. Died ——, 1897.
BURTS, J. H., Austin. Died January 15, 1894.

CARRINGTON, W. A., Houston. Died July 14, 1892.
CLEVELAND, C. L., Galveston. Died February, 1892.
CRAIN, W. H., Cuero. Died February 10, 1896.
CROOM, J. L., JR., Wharton. Died August 2, 1890.

DEVINE, THOS. J., San Antonio. Died March 16, 1890.

FORD, P. S., Cameron. Died December 11, 1893.
FRISBIE, W. H., Groesbeeck. Died September 12, 1883.

GARRETT, N. P., Cameron. Died August 3, 1888.
GIVENS, J. S., Corpus Christi. Died January 20, 1887.
GOLDTHWAITE, GEORGE, Houston. Died April 23, 1897.
GOSLING, H. L., Castroville. Died February 21, 1885.
GUINN, R. H., Rusk. Died January 18, 1888.

HAGGERTY, J. J., Bellville. Died April 7, 1893.
HANCOCK, JOHN, Austin. Died July 19, 1893.
HERRING, M. D., Waco. Died November 27, 1897.
HILL, GEORGE L., Gainesville. Died July 25, 1887.
HOLMES, H. M., Mason. Died August 17, 1895.
HUTCHINGS, R. M., Galveston. Died August 22, 1895.

JACKSON, A. M., SR., Austin. Died July 11, 1889.
JACKSON, A. M., JR., Austin. Died August 17, 1894.
JOHN, A. S., Beaumont. Died February 5, 1889.
JONES, C. ANSON, Houston. Died January 10, 1888.

KENNARD, JNO. R., Anderson. Died October 24, 1884.
KILGORE, S. B., Wills Point. Died December 10, 1891.
KIRK, LAFAYETTE, Brenham. Died July 29, 1893.

LANGUILLE, P. T., Galveston. Died October 14, 1882.
LEDBETTER, W. H., La Grange. Died April 24, 1896.
LOGUE, L. J., Columbus. Died May 15, 1884.
LOOSCAN, M., Houston. Died September 7, 1897.

MANN, H. K., Galveston. Died December 14, 1888.
MASON, GEORGE, Galveston. Died February 3, 1896.
MASON, J. R., San Antonio. Died July 29, 1888.
MASTERSON, B. T., JR., Galveston. Died ——, 1897.
MAXEY, S. B., Paris. Died August 16, 1895.
McCOY, JNO. C., Dallas. Died April 30, 1887.
McLEMORE, M. C., Galveston. Died July 23, 1897.
MOORE, GEO. F., Austin. Died August 30, 1883.

NOBLE, S. B., Galveston. Died March 20, 1890.

OCHSE, J. F., San Antonio. Died September 24, 1888.

PASCHAL, GEORGE, San Antonio. Died Sept. 7, 1894.
PEARESON, P. E., Richmond. Died July 31, 1895.
PECK, L. D., Fairfield. Died May 30, 1885.
PEELER, A. J., Austin. Died November 3, 1886.
PHELPS, R. H., LaGrange: Died March 24, 1898.
PONTON, T. J., Gonzales. Died December 9, 1889.
PRENDERGAST, H. D., Austin. Died November 5, 1886.

QUINAN, GEORGE, Wharton. Died January 25, 1893.

READ, N. C., Corsicana. Died October 25, 1884.
ROBERTS, O. M., Austin. Died May 19, 1898.
ROBERTSON, JOHN W., Austin. Died June 30, 1892.
ROBERTSON, SAWNIE, Dallas. Died June 21, 1892.
RUCKER, W. T., Belton. Died August 10, 1885.

SAYLES, JOHN, Abilene. Died ——, 1897.
SHELLEY, N. G., Austin. Died January 5, 1898.
SHROPSHIRE, E. L., Comanche. Died July 4, 1894.
SIMPSON, ISAAC P., San Antonio. Died ——, 1896.
STAYTON, JOHN W., Victoria. Died July 5, 1894.
STEWART, JOE H., Austin. Died August 14, 1890.
SWEARINGEN, J. T., Brenham. Died August 14, 1890.

TEMPLETON, JOHN D., Fort Worth. Died April 24, 1893.
TIMMONS, B., LaGrange. Died June 17, 1884.
TUCKER, PHILIP C., Galveston. Died July 9, 1894.

WAELDER, JACOB, San Antonio. Died August 28, 1887.
WALKER, A. S., SR., Austin. Died August 14, 1896.
WALKER, RICHARD S., Galveston. Died May 24, 1892.
WALLACE, W. R., Castroville. Died November 12, 1884.
WALTHALL, L. N., San Antonio. Died February 22, 1894.
WARD, P. H., San Antonio. Died January 28, 1889.
WEST, CHARLES S., Austin. Died October 23, 1885.
WILKES, F. D., Lampasas. Died November 21, 1886.
WILLSON, SAM A., Rusk. Died January 24, 1891.

[NOTE.—The Secretary requests all members to notify him promptly of the death of any member of the Association.]

LIFE TENURES OF OFFICE IN A REPUBLICAN GOVERNMENT.

ANNUAL ADDRESS

DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

BY

JUDGE SAM J. HUNTER,

OF THE FORT WORTH BAR.

Mr. President and Gentlemen of the Texas Bar Association:

Our Federal Constitution provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish;" that the judges of said courts shall be appointed by the President, by and with the advice and consent of the senate, and "shall hold their offices during good behaviour." It is to this latter provision, fixing the judges terms of office for life, which I wish to invite your attention for a little while.

Any one who will take the pains to read the proceedings of the convention of 1787, which framed our Federal Constitution, will readily perceive that it was the intention and purpose of our patriot fathers to form a republican government consisting of three co-ordinate branches, which they denominated the legislative, the executive, and the judicial. It is also clear from the debates in that convention that they understood and intended that these three branches should, each one, be separate and independent in its powers, duties and responsibilities from the other two, and each be supreme in its sphere of action. In

Mr. Elliott's report of the debates of that convention we find that, while much of the time of the convention was consumed in discussing the powers of Congress and of the President, there was hardly any discussion of the judiciary article, and what little occurred was to the point of showing that, in order to make the judiciary independent of the other two branches of government, it was necessary to fix the terms of office of the judges for life, or, what was considered by them as the same thing, "*during good behaviour.*"

Some of our younger members of this association may not know that the brain and fingers which furnished the framework and terms of the judiciary article as it now exists were those of a monarchist—of an imperialist—whose efforts in that convention had been to fasten upon this country a senate with sovereign powers whose aristocratic members would hold their terms of office for life, and who should represent, in this government, the wealth of the country as against the masses of the people. This man was Governor Morris, of Pennsylvania, and who, on the 22nd day of December, 1814, wrote to Timothy Pickering: "That instrument (the constitution) was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases which, expressing my own notions, would not alarm others, nor shock their self love; and to the best of my recollection, this was the only part which passed without a cavil."—1 Elliott's Debates, 507.

Of this man Mr. Madison wrote to Mr. Sparks on the 8th day of April, 1831, as follows: "Whether he accorded precisely with the 'political doctrines of Hamilton' I cannot say. He certainly did not 'incline to the democratic side,' and was very frank in avowing his opinions, when most at variance with those prevailing in the convention. He did not propose any outline of a constitution, as was done by Hamilton; but contended for certain articles (a senate for life particularly) which he held essential to the stability and energy of a government capable of protecting the rights of property against the spirit of democracy. He wished to make the weight of wealth balance that of numbers, which he pronounced to be the only effectual security of each, against the encroachments of the other."—1 Elliott's Debates, 507.

Luther Martin, of Maryland, a delegate of the federal conven-

tion, reported to the legislature of his State, January 27, 1788, in a speech made by him as follows: "There was one party whose object and wish it was to abolish and annihilate all State governments, and to bring forward one general government over this extensive continent of a monarchical nature, under certain restrictions and limitations. Those who openly avowed this sentiment were, it is true, but few; yet it is equally true, sir, that there was a considerable number who did not openly avow it, who were, by myself and many others of the convention, considered as being in reality favorers of that sentiment, and, acting upon those principles, covertly endeavoring to carry into effect what they well knew openly and avowedly could not be accomplished."—1 Elliott's Debates, 350.

As I said before, there was little or no discussion of this article. It seems that it just glided through and into the body of the constitution as noiselessly as did that notorious Serpent of Evil glide into the garden of Eden; and it does seem now as if the figure is to be further carried out; for, as by the deceitful words of that Serpent, we are told, the other two legitimate inhabitants of the garden were deceived and caused to be driven out; so, by the usurped power and unrighteous decisions of this imperial, life-tenured judiciary, are the legislative and executive branches of our government to be annulled and destroyed, and the rights and liberties of the people "submerged in a sordid despotism of wealth."

Some of the grand old patriots of that convention refused their consent to the instrument, and they have not left us without their reasons for their opposition to it; though no one of them, it seems, *then* saw or conceived of the real danger which lurked and coiled in this clause giving to the judges tenure of office for life. No court of Great Britain had ever declared an act of parliment to be void, for indeed, under the British system of government then, as now, the acts of parliament constituted the supreme law of the land. The British courts construed them but had no power to set them aside, for parliament, in that government, as just stated, is the supreme law-making power of the state, and that body is the sole judge of the validity of its acts—the only appeal therefrom being to the sword of revolution.

They saw that the judges of England were appointed for life, and were no doubt familiar with Blackstone's high commendation of this feature in the British constitution, as being a protection against the arbitrary and despotic action of the prince, and as making the courts of the realm independent of him.

They were, therefore, guarding this weakest of all the departments, as they supposed, against the strong arm of the executive, as well also, in a measure, against the violent eruptions of passion and prejudice likely sometimes to occur in the popular branch of the government. But the necessity for life-tenured judges in England existed by reason of the fact that both the king and members of the house of lords held their offices for life.

When, however, this instrument was submitted to the States for ratification and adoption some of the members of that convention who refused to sign it, made known their objections, and among them we find the following:

Governor Edmund Randolph, of Virginia, in submitting his report of it to the house of delegates, stated his objections thereto, and among the changes he suggested relating to the judiciary were the following: "3. Taking from the President the power of nominating to the judiciary offices." And 8. "Limiting and defining the judicial power."—1 Elliott's Debates, 491.

Hon. George Mason, another delegate to that convention who also refused to sign it, in his official report to the house of delegates of Virginia, stated one of his objections to be: "The judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States; thereby rendering laws as tedious, intricate and expensive, and justice as unattainable by a great part of the community, as in England; and enabling the rich to oppress and ruin the poor." —1 Elliott's Debates, 495.

Mr. Breckenridge, of Kentucky, in 1802, said in a speech in Congress on the subject: "To make the constitution a practical system, the power of the courts to annul the laws of Congress cannot possibly exist. My idea of the subject, in a few words, is—That the constitution intended a separation only of the powers vested in the three great departments, giving to each the exclusive authority of acting on the subjects committed to each; that each is intended to revolve within the sphere of its own orbit; is responsible for its own motion only, and is not to direct or control the course of others; that those, for example, who make the laws, are presumed to have an equal attachment to, and interest in, the constitution; are equally bound by oaths to support it and have an equal right to give a construction to it; that the construction of one department, of the powers particularly vested in that department, is of as high authority, at least, as the construction given to it by any other department;

that it is, in fact, more competent to that department, to which powers are exclusively confided, to decide upon the proper exercise of those powers, than any other department to which such powers are not entrusted, and who are not consequently under such high and responsible obligations for their constitutional exercise; and that, therefore, the legislature would have an equal right to annul the decisions of the courts, founded on their construction of the constitution, as the courts would have to annul the acts of the legislature founded on their construction.

"Although, therefore, the courts may take upon them to give decisions which go to impeach the constitutionality of the law, and which, for a time may obstruct its operation, yet I contend that such law is not the less obligatory because the organ through which it is to be executed has refused its aid. A pertinacious adherence of both departments of their opinions would soon bring the question to an issue, which would decide in whom the sovereign power of legislation resided, and whose construction of the constitution as to the law-making power ought to prevail."—4 Elliott's Debates, 444.

But above all these I desire to throw out upon the canvas of American thought, for the view and contemplation of American freemen, the golden words of that greatest of American statesmen—the champion of the rights of man. It was a standing doctrine of Mr. Jefferson's administration, that, "Each department of the government was truly independent of the others, and had an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action."—3 Randall's Life of Jefferson, 453.

In 1807, while President, he wrote Mr. George Hay in reference to Burr's trial then pending before the Federal Circuit Court at Richmond: "The constitution intended that the three great branches of the government should be co-ordinate, and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch. A judge, I presume, cannot sit on a bench without a commission or a record of a commission, and the constitution having given to the judiciary branch no means of compelling the executive either to deliver a commission or to make a record of it, shows it did not intend to give the judiciary that control over the executive, but that it should remain in the power of the latter to do it or not. Where different branches have to act in their respective lines, finally and without appeal under any law, they may give to it different and opposite constructions. Thus, in

the case of William Smith, the house of representatives determined he was a citizen, and in the case of William Duane (precisely the same in every material circumstance), the judges determined he was no citizen. In the cases of Callendar and others, the judges determined the sedition act was valid under the constitution, and exercised their regular powers of sentencing them to fine and imprisonment. But the executive determined that the sedition act was a nullity under the constitution, and exercised his regular power of prohibiting the execution of the sentence, or rather of executing the real law, which protected the acts of the defendants. From these different constructions of the same act by different branches, less mischief arises, than from giving to any one of them a control over the others. The executive and senate act on the construction, that until delivery from the executive department, a commission is in their possession and within their rightful power; and in cases of commission not revocable at will, where, after the senate's approbation and the President's signing and sealing, new information of the fitness of the person has come to hand before the delivery of the commission, new nominations have been made and approved, and new commissions have issued.

"On this construction, I have hitherto acted; on this I shall ever act, and maintain it with the powers of the government against any control which may be attempted by the judges in subversion of the independence of the executive and senate within their peculiar department. I presume therefore, that in a case where our decision is by the constitution the supreme one, and that which can be carried into effect, it is the constitutionally authoritative one, and that that by the judges was *coram non judice* and unauthoritative, because it cannot be carried into effect. I have long wished for a proper occasion to have the gratuitous opinion in Marbury vs. Madison brought before the public, and denounced as not law, and I think the present a fortunate one, because it occupies such a place in the public attention. I should be glad, therefore, if, in noticing that case, you could take occasion to express the determination of the executive, that the doctrines of that case were given extra judicially and against law, and that their reverse will be the rule of action with the executive."—4 Writings of Jefferson, 75.

In 1816 he wrote Samuel Kerchieval as follows: "In the judiciary the judges of the highest courts are dependent on none but themselves. In England, where judges were named and removable at the will of an hereditary executive, from which branch most misrule was feared and has flowed, it was a

great point gained, by fixing them for life, to make them independent of that executive. But in a government founded on the public will, this principle operates in an opposite direction and against that will. There, too, they were still removable on a concurrence of the executive and legislative branches. But we have made them independent of the nation itself. * * *. It has been thought that the people are not competent electors of judges *learned in the law.* But I do not know that this is true, and, if doubtful, we should follow principle. In this, as in many other elections, they would be guided by reputation, which would not err oftener, perhaps, than the present mode of appointment. In one State of the union, at least, it has been long tried, and with the most satisfactory success. The judges of Connecticut have been chosen by the people every six months for nearly two centuries, and I believe there has hardly ever been an instance of change; so powerful is the curb of incessant responsibility." * * * "I am not among those who fear the people. They, and not the rich, are our dependence for continued freedom."—4 Jefferson's Writings, 287, 288, 289.

In September, 1819, he wrote Judge Roane, of Virginia, concerning the Supreme Court of the United States, as follows: * * * "In denying the right they usurp of exclusively explaining the constitution, I go further than you do, if I understand rightly your quotation from the Federalist, of an opinion that 'the judiciary is the last resort in relation *to the other departments* of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.' If this opinion be sound, then indeed is our constitution a complete *felo de se.* For, intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others; and to that one, too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scarecrow. * * * The constitution on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that, whatever power in any government is independent, is absolute also; in theory only at first while the spirit of the people is up; but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the consti-

tution is very different from that you quote. It is that each department is truly independent of the other, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal. I will explain myself by example, which, having occurred while I was in office, are better known to me, and the principles which govern them.

"A legislature had passed the sedition law. The federal courts had subjected certain individuals to its penalties of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the constitution, and therefore null. In the case of Marbury vs. Madison, the federal judges declared that commissions, signed and sealed by the President, were valid, although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed, it is in *posse* only, but not in *esse*, and I withheld delivery of the commissions. They cannot issue a mandamus to the President or legislature or to any of their officers. When the British treaty of 1807 arrived, without any provision against the impressment of our seamen, I determined not to ratify it. The senate thought I should ask their advice. I thought that would be a mockery of them, when I was predetermined against following it, should they advise its ratification. The constitution had made their advice necessary to confirm a treaty, but not to reject it. This has been blamed by some; but I have never doubted its soundness. In the cases of two persons, *antenate*, under exactly similar circumstances, the federal court had determined that one of them (Duane) was not a citizen; the house of representatives, nevertheless, determined that the other (Smith, of South Carolina) was a citizen, and admitted him to his seat in their body. Duane was a republican, and Smith was a federalist, and these decisions were during the federal ascendency.

"These are examples of my position, that each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question."—4 Jefferson's Writings, 316, 317, 318.

In 1820 he wrote Thomas Ritchie as follows: * * * "But it is not from this branch of government (Congress) we have most to fear. Taxes and short elections will keep them right.

The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordinate, general and special government to a general and supreme one alone. This will lay all things at their feet, and they are too well versed in English law to forget the maxim, '*Boni judices est exempliare jurisdictionem.*' We shall see if they are bold enough to take the daring side their five lawyers have lately taken. If they do, then, with the editor of our book, in his address to the public, I will say, that against this 'every man should raise his voice,' and more, should uplift his arm. * * * Having found from experience that impeachment is an impracticable thing—a mere scare-crow—they consider themselves secure for life. * * * A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a Republican Government."—4 Jefferson's Writings, 337.

In 1822, only four years before his death, he wrote to William T. Barry, perhaps the last words he ever penned on the subject, as follows: * * * "We already see the power, installed for life, responsible to no authority (for impeachment is not even a scare-crow), advancing with a noiseless and steady pace to the great object of consolidation. The foundations are already deeply laid by their decisions, for the annihilation of constitutional State rights, and the removal of every check, every counterpoise to the engulphing power of which themselves are to make a sovereign part. If ever this vast country is brought under a single government it will be one of the most extensive corruption, indifferent and incapable of a wholesome care over so wide a spread of surface. This will not be borne, and you will have to choose between reformation and revolution. If I know the spirit of this country, the one or the other is inevitable. Before the canker is become inveterate, before its venom has reached so much of the body politic as to get beyond control, remedy should be applied. Let the future appointment of judges be for four or six years and renewable by the President and senate. This will bring their conduct, at regular periods, under revision and probation, and may keep them in equipoise between the general and special government. We have erred in this point, by copying England, where, certainly, it is a good thing to have the judges independent of the king. But we have omitted to copy their caution also, which makes a judge removable on the address of both legislative houses. That there

should be public functionaries independent of the nation, whatever may be their demerit, is a solecism in a republic, of the first order of absurdity and inconsistency."—4 Jefferson's Writings, 352, 353.

It is well known that President Andrew Jackson entertained the same views on the power of each of the three branches to construe the constitution for itself in every case where it was called upon to act. In his message to Congress vetoing the act extending the Charter of the United States Bank, he said: "Each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it was understood by others." And in the same message he denounced the schemes of the wealthy managers and incorporators of said bank as those which "undertake to make the rich richer and the potent more powerful" and which therefore give "the humble members of society, the farmers, the mechanics and laborers, who have neither the time nor the means of securing such favors, a right to complain of the injustice of their government." And these declarations and sentiments were made the principal points of attack on him in his second race for the presidency in 1832. But the people indorsed him in his acts and declarations as against the money power which he had defied, and against the matchless oratory of Henry Clay—receiving, as he did, 219 electoral votes to Clay's 49. And when the money kings of the country flaunted in his face the decisions of the Supreme Court of the United States in support of the constitutionality of the act incorporating the United States Bank, he had the heart of hickory and the nerve of steel to declare to his "Kitchen Cabinet" that, "By the eternal I am President of the United States, and under the constitution I have the right and it is my duty to determine for myself what acts of congress are constitutional and what are not." And "by the eternal" he did it, and overthrew for the time the tables of the money changers and drove them from the temple.

In defeating this nest and brood of vampires who were preparing to suck the life blood of the nation, and to rule the people through the corrupting influences of the power of aggregated wealth, he defied, not only the Supreme Court in its self-assumed power to construe the constitution for him, but the acts of congress as well, which essayed in the same direction. And the name of "Old Hickory" today is dear to the heart of every American freeman. And how I prayed for the spirit of this grand old commoner and hero to fill the executive chair for a little while, when that same imperial, irresponsible body,

by a bare majority of one, performed that crowning act of usurpation in the decision of the income tax cases. President Jackson would have collected the tax, after having signed the bill, even at the point of the bayonet. Such an act on the part of the executive at that time would have settled the question in favor of the people, and curbed the pretensions of this irresponsible body as well as the arrogance and power of wealth. It would have proved to the world that the American Republic, unlike any other government on earth, recognises no privileged classes, but was indeed and in truth "a government of the people, by the people and for the people." Mr. Cleveland here missed the opportunity of his life for proving his democracy and his patriotism. But what could have been expected from a man who had been raised to affluence and power by the money of the very millionaires of New York city in whose favor this dangerous decision was rendered.

That court, by its decision in this case and its later decision in the Nebraska maximum rate case, has set at naught the power of Congress to regulate and control, through the instrumentalities of its own selection, the commerce of the country, or to tax the surplus wealth of the land even in the dire necessities of war. They assume the right to declare that any tax upon an income which is derived from the rent of land or from the interest on stocks and bonds or other investments of personal property, is a direct tax; when it had, previously, in five different cases covering a period of about one hundred years, held, in effect, directly to the contrary; that is, it had held that, within the meaning of the constitution, the terms "direct tax" meant only tax upon land and the improvements placed thereon; and, that a tax upon personal property was not a direct tax. See Justice White's dissenting opinion in Pollock vs. The Farmers Loan & Trust Co., 157 U. S., 608, and those of Justices Harlan, Brown and Jackson in same case, 158 U. S., 638, 686, 696.

In order to protect its right to "lay and collect taxes," Congress had declared by statute in 1867 (Section 3224, Revised Statutes) that, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." But this act, too, was thrust aside with hardly a decent explanation by this imperial court in its alacrity to rush to the rescue of the particular wards of its self-assumed care.

It had always been thought by the profession that Congress had the power to limit, control or take away the jurisdiction of the circuit and inferior courts of the United States, inasmuch as they are the creatures of Congress under the constitution; and

this proposition was so well grounded in the minds of lawyers that I have heard it said there was one mode of relief left to Congress and to the people, and that was, to strip these piratical courts of their jurisdiction. That was just what Congress meant to do in cases affecting the rights and powers of the federal and State governments to assess and collect their taxes, and is just what would have been accomplished if we had had a democratic executive in office at the time, with the nerve and patriotism to defend the constitution of the United States as he had solemnly sworn to do. The people cannot administer their governments, State or federal, without, in some form, collecting taxes. It is said that the power to collect taxes from the people is among the highest powers of government. Without this power government cannot exist, and I do not think that the patriot statesmen who framed our constitution intended that the surplus wealth of the land should be exempt from taxation; that the owners of the stocks and bonds of the sugar trust, and of the liquor trust, and of the oil trust, and of the iron trust, and all the other trusts and wealthy individuals and corporations of this country should pay no taxes upon the billions of dollars they have invested therein, while reaping therefrom annually hundreds of millions of dollars by way of profits from the masses of the people who consume their products. The people of the United States are thinking the same way about it, and when they come to understand the situation they will demand that equality before the law which compels every man to pay taxes in proportion to his wealth, which seems to me to be a just and righteous principle in government, and I do hope that this will be effected without the shedding of blood.

Had the office of the judges of our Supreme Court been elective by the people of certain supreme judicial districts composed of certain groups of States, and for a term of not more than six years, can any man doubt that this decision would ever have been rendered? Any irresponsible power in a government will ultimately become despotic. There must be checks and balances on every power—on every department. This imperial court has usurped the power to declare what construction the other two co-ordinate branches of the government shall place upon the constitution. In other words, to declare what they may do and what they may not do—who the Congress may tax and who it shall not tax. The exercise of this discriminating power of taxation results necessarily in the establishment of privileged classes, and this court, it seems, like the priests of

the Delphic Oracle and like every other irresponsible and despotic power on earth, shows its inclination to favor the privileged classes, and the wail of the tariff-oppressed people is drowned in the screeching and clamor of the stock exchange. They see only, or pretend to see, that the vast wealth of the country is in jeopardy. Property must be protected. The rights of man must be guarded. But which man? That's the question. And it makes all the difference in the world, in arriving at a decision of this question, whether the judge holds his office for life or by the good will of the people for a term of years. Not that I would impeach his honesty, for I do not, but it is well to consider his antecedents, and also hold him responsible to the people for his acts and judgments.

I believe that the supreme consideration of government ought to be the welfare, prosperity and happiness of the people, and that the powers of government should be exerted to that end. I believe that each of the three departments of our government should be made directly responsible to the people, but especially the one which now claims supremacy over both the others. If the Supreme Court is to be the ruling and supreme power in this nation then the people should have a voice in the selection of the judges. I believe that the laws of a nation, both statutory and organic, ought to be construed by its courts so as to effect the purposes intended by the people and in order to secure their welfare, prosperity and happiness. And when I say the people I do not mean only the millionaires—the bond and stock gamblers of this country—I mean the toiling masses whose industry in the calms of peace produce the wealth of this nation, and whose valor and courage defend her honor amid the storms of war. The executive and the legislative branches of our government are elected by the people either directly or indirectly—so that a continuance in office, even for a second term, will depend upon the officer's fidelity to their interests. And why should not the federal judges receive their commissions from the people also? I believe in an independent judiciary but not one independent of the people. I can see no good reason why wealth should not bear its proportion of the burdens of government, and, but for the *ipse dixit* of this life-tenured court, it would be doing so today.

It has been these lordly, life-tenured, independent gentlemen who have formed and ruled the despotic governments of the world. Such a dangerous and cankering sore should not longer exist in our Republican Constitution. I think that our government, properly and constitutionally administered as our fathers

intended and understood it to be established, is the grandest and best the world ever saw. Thus considered it is a republic—a sovereignty, if you please—based upon the intelligence, virtue and manhood of the people, where every man stands upon an equal footing before the law and feels that he is a sovereign—a prince of the blood royal—whether he has a dollar in his pocket or not.

Do you know why the American soldiers and sailors are the bravest and best fighters in the world? It is because every one of them from the private in the ranks to the commanding general—from the jackie on the war ship to the admiral—feels the same personal responsibility for the results of the war that the President himself feels. Under our free government a boy understands from the time he is big enough to crack a whip or ride a pony that he may some day be President of the United States, or a senator, or a congressman; for under our free institutions all the avenues to fame and power, as well as to fortune, are open to him; that the voice of the people is the supreme law of the land, and that the officers placed in power are only his servants. So when the heights of Santiago were to be stormed and captured, the bursting shells of the Spaniards and the sheets of flame from their rifles checked not the steady advance of our raw recruits. But onward they swept like regulars up the mountain's steep sides, in the face of the blazing fires of death and hell, until they planted our country's banner of freedom and glory on the ramparts of the vanquished cohorts of Spain, while the world stood still in silent amazement at the invincible courage and cool resolution of a handful of American youths fresh from the farms and workshops and clerk's desks of democratic America. They never stopped. They never waivered. They wanted no leaders. They led. And when young Hobson, the hero of the Merrimac, from his prison cell saw, through the flame and smoke of the battle, this dauntless charge of his young countrymen, his heart swelled with patriotic pride, and, while the blinding tears of joy rolled down his manly cheeks, exclaimed: "None but American soldiers could do that." Such individual character can be found only in a government where the voice of the people is the supreme law of the land, and where equal justice is administered by the courts to the poor as well as to the rich. In a government founded upon the principle of equal justice to all, special privileges to none.

But, my countrymen, if this imperial, life-tenured, usurping federal judiciary is to turn our government into one for the protection of an aristocracy of wealth—the most hateful aristocracy

on earth—the princely, dauntless spirit of the American soldier and sailor will sink into that of the hired, cowardly mercenary, and then, I pray God that the clash of arms in civil strife may not be heard in the land, as it was heard in the rich and rotten, imperial republic of Rome.

SUGGESTIONS AS TO NEEDED REFORMS IN THE ASSESSMENT AND COLLECTION OF TAXES.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. NORMAN G. KITTRELL,

OF THE HOUSTON BAR.

Mr. President and Gentlemen of the Texas Bar Association:

There are certain fundamental propositions relating to taxation which cannot be questioned or gainsaid, and it may not be without profit to state them as preliminary to what is said herein.

In stating such propositions no originality will be attempted, but I shall content myself with using substantially the phraseology of recognized authorities. I shall in this brief paper not attempt to discuss taxation in the abstract, but shall simply call attention to what appears to me to be serious defects in our statutes concerning the assessment and collection of taxes—and to point out how certain statutes seem to me to be in patent conflict with the constitutional guarantees of protection to the property of the citizen—if the popular construction thereof be correct.

To what extent, if any, this is true can best be understood by the statement of elementary principles, as above suggested.

The power to tax is inherent in government. It is an act of sovereignty and one of its attributes. It is a legislative power, and is limited only by constitutional provisions—and courts cannot control its exercise unless such exercise conflicts with constitutional limitations. Taxation is the system by which the reve-

nues of the government are collected, and its theory and purpose is, that a common burden shall be sustained by common contribution and natural and artificial citizen contributing rateably, according to the property found subject to taxation. In the constitution of Texas, as well as that of every other State, is the requirement that taxation shall be equal and uniform. It is not difficult to state these abstract, yet essential, principles, but their practical application has been ever a source of adverse difficulty, and has provoked numberless judicial opinions.

In connection with these well established principles, it is proper to state here the constitutional guarantee, that no citizen shall be deprived of his property except by due course of law, and to call to mind the fact that the right of appeal to learned courts is given to any citizen who feels aggrieved at any judgment of the county or district courts.

With this brief preliminary statement the inquiry will not be made whether the principles stated are observed and the constitutional guarantees regarded.

It is not necessary to trace or state the familiar processes by which property is assessed for taxes—and the rolls prepared for inspection by the board of equalization, but we will suppose that that stage, to the process of reaching the pockets of the tax-payers, has been arrived at.

The board of equalization consisting of the county judge and four commissioners meets in solemn conclave—and ere long the trembling culprit citizen who is unfortunate enough to own property is summoned before it. He is brought to show cause why his assessment should not be raised. The assessor, usually a man familiar with values and presumably at least as honest and intelligent as the members of the revisory board, has fixed his value on the property generally after agreement with the tax-payer upon a value satisfactory to both,—but which is not satisfactory to the board.

The tax-payer appears, shows cause as required,—and his rendition of say $1000 is often coolly raised another thousand and (not intending to perpetrate a pun—or drop into the vernacular of Dallas or San Antonio) the citizen must "stand the raise," at least that is his only alternative if the popular construction of article 5124 of the Revised Statutes is to be accepted as constitutional and conclusive.

I am not ignorant or unmindful of the decisions of our Supreme Court of this State construing said article,—but I do not propose to analyze or discuss the same in this paper. My purpose in the main is to call attention to what abuse and oppres-

sion the citizen may, without remedy, be subjected if the popular and widely prevailing view as to article 5124 (that when the commissioners court sitting as a board of equalization has acted upon an assessment there can be no correction or appeal) be sustained and carried out to its legal sequence by the courts. While doubtless county commissioners are as a rule men of average intelligence and integrity and usually desire to do right, yet I have neither seen nor heard of any of said officials who were possessed of the attribute of infallibility, and I deem it not wholly impossible that some of the great number of them might even consider whether the person whose assessment was under consideration was an artificial person who would not appear at the polls at the next election—or as a natural citizen who might be useful at the "polladium of the people's liberty."

We have seen that stage in the process reached where the assessment is raised, perhaps ten, perhaps a hundred—perhaps, as I have known, twelve hundred per cent. Manifestly said action is oppressive and if the tax be paid on such assessment the citizen, as to every dollar he pays in taxes above what a fair assessment would require, is deprived of his property without right of appeal.

A case can be readily supposed which can be seen as a fact any day in Harris county. In the district court room up stairs a jury returns a verdict against a citizen for say one dollar and the court refuses a new trial. So that citizen is accorded the right of appeal to a court composed of lawyers of profound learning. Down stairs the assessment of a citizen is raised from $30,000 to $60,000 (I state an actual case), and this last citizen has no right of appeal, though by the action of the board the citizen has been deprived of $30,000 without due process of law.

The statute manifestly does not mean that no order of the commissioners court shall be revised; because the substantial language of the statute is that the board shall have the power to increase or diminish the valuation fixed by the assessor "and to fix a proper valuation" to the property and then its action shall not be subject to revision. The power of the board is limited to fixing a "fair market value," and no other valuation is a proper one, and if it is not proper it follows that its action is subject to revision. At least protection may be had by injunction on the ground of fraud, or by cross action for relief when sued for taxes. That this is true is settled by decisions of Texas courts to which reference is hereinafter made. If the assessment has been arbitrarily raised regardless of "the fair market value" of the property and in violation of the statutory

command requiring such valuation—then the action of the board is illegal and fradulent in both the common sense and technical meaning.

The test as suggested to me by a valuable and distinguished member of this association is in simple terms: Did the board acting under their oaths honestly and in good faith believe the property was fairly and reasonably worth, upon the market, the value they placed upon it?—if not, then their action is in the legal sense corrupt, and the court can be appealed to to correct the wrong and protect the citizen. This test commends itself to me as sound and just. Whether a proper valuation has been fixed, becomes a question for judicial determination upon proper allegation, in like manner as under certain circumstances the question of whether weight rates on railroads are, or are not, sufficient and reasonable, becomes a question for the courts. If this is not true, then the tax-payer is left to the unrestrained will and caprice of the board of equalization, by which his property may be confiscated and he be deprived thereof without due process of law.

The general holding is that where the action of the board in raising an assessment is the result of honest but mistaken judgment, such error of judgment will not authorize or justify injunction to restrain the collection of the tax. However, Mr. High, in his work on Injunction, says: "Notwithstanding the well established doctrine denying any supervisory power in courts of equity to revise the action of boards of review or equalization charged with the duty of revising and equalizing valuations and assessments, there have been instances of interference by injunction to prevent the enforcement of taxes based upon such arbitrary, illegal or oppressive action upon the part of these boards as to amount to a fraud against the tax-payer." —Section 494, Vol. 1, High on Injunctions.

Mr. Justice Scholfield, in 75 Ill. Rep., 591, says in substance: The rule adopted must be that the valuation is the honest expression of judgment of the majority of the board. It is plain that this assessment, because in violation of that rule and consistent with no other reasonable theory of valuation, cannot be the honest judgment of the majority of the board. It is an arbitrary and unreasonable valuation. * * * We hold it is not the duty of the courts to exercise any supervisory care over the valuations of the board so long as it acts within the scope of the powers with which it is invested and in obedience to what might be reasonably presumed to be an honest judgment, however much we may disagree with it. But whenever

the board undertakes to go beyond its jurisdiction, or to fix valuation through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere to protect tax-payers against the consequences of its acts. Where its jurisdiction is conceded no mere difference of opinion as to the reasonableness of its valuations will justify equitable interference, but its action must be the result of honest judgment, and not of mere will.

It is not believed that any reasonable man or any court capable of comprehending the fundamental constitutional questions involved will dissent from this statement of the law.

Two decisions have recently been rendered by Mr. Justice Hunter of the Court of Civil Appeals at Fort Worth, which are able expositions of the law and by which he has made the profession and the people his debtor, and the purport whereof can be ascertained from the syllabi of the reporter:

1. The district court has jurisdiction to entertain a petition for injunction to restrain the collection of a tax based upon an assessment that as to the petitioner is unreasonably excessive and fradulently made where the amount involved is within the jurisdiction of the court.

2. A petition for injunction restraining the collection of a tax which states that the tax was based upon an assessment which was unreasonably excessive and made in fraud of plaintiff's rights and discriminates against him, states a cause of action.

3. When the board of equalization in raising or fixing the value of property acts from corrupt and fraudulent motives and in violation of the law of the State their acts are voidable at the suit of the party aggrieved, and the provisions of article 5124 of the Revised Statutes that declare such action shall not be subject to revision does not preclude appeal to the courts for relief.

In this case, Johnson vs. Holland, 43 S. W., 71, the board of equalization stated it knew the owner could not sell the property for what he had rendered it, but they had to raise the assessment because the county needed the money and the district court held such action could not be revised or reviewed by that court. The Court of Civil Appeals reversed that judgment and the Supreme Court refused a writ of error.

In the case of Mann vs. The State, 46 S. W., 652, Mann was defendant in the court below, having been sued for taxes, and he set up substantially the same ground for relief that John-

son as plaintiff had set up in the preceding case and the court held that Mann's cross action was in the nature of a direct proceeding and was properly pleaded and the demurrer thereto ought to have been overruled, and because it was not the judgment was reversed.

Judge Hunter in Johnson's case very properly says: "The legislature has no power to create any board or commission and empower it to confiscate any person's property either directly or indirectly." He quotes also the bill of rights guaranteeing every person remedy for any injury by due course of law which he declares is not only "the valid statutory enactments of the legislature but the general law of the land," a law which hears before it condemns—which proceeds upon inquiry and renders judgment only after trial.

The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.—Cooley, Const. Lim., pp. 231-232.

The court further says the board has no right or power to willfully assess any person's property at more than its fair market value, and to thus discriminate against any person or corporation, and wherever, by any device, such discrimination occurs, it is the constitutional right of the persons so injured to have redress in the courts by decree annulling such action on the ground of fraud. All such arbitrary acts performed in the exercise of judicial power are fraudulent and voidable in the proper tribunals of the State by direct proceedings to set them aside. Johnson vs. Holland, 43 S. W., 71. In the course of the decision above quoted, the opinion of Judge Scholfield, herein referred to, is quoted at length.

With these references to the decisions, it is proper to next examine and see what is the practical result of the use of the powers claimed and exercised by the board of equalization.

In one case within my knowledge the property of a corporation was rendered for state and county taxation at $30,000, in round numbers, which was more than its actual cost as it stood, or when it was first placed in position. The company received no notice to appear before the board, but the board, without a word of evidence or showing of any kind, raised the assessment to $65,000. The same company in a city in the same county rendered its property for $4000, a sum slightly in excess of its cost, but inasmuch as its franchise had a taxable value, the rendition was too low and should have been raised to a fair value. The board did raise it to $25,000, against which the corporation protested, but upon which valuation it paid at the rate of 2 per

cent ad valorem. Pending efforts to procure rendition, the board fixed the assessment on the identical property for 1897 at $50,000, and when objection was made, and before adjustment could be affected, the board fixed the valuation for 1890 at $100,000, a sum 50 per cent greater than the gross receipts of the company in that city, and twenty-five times more than the actual cost of the property. The extent of the company's property in the county is nearly twenty times greater than in the city, yet that in the city is assessed at $100,000, while that in the county is for 1898 assessed at $30,000, or that in the county at $126 a mile and that in the city at $7000 a mile. The same provisions as to frivolity of the board's action and its exemption from revision or review is found in the city charter as in article 5124 of the Revised Statutes. This illustration is supplied by an actual pending condition as to the assessment of a corporate tax-payer.

It is a matter of common knowledge that in many instances the property of a railroad in one county is assessed at one figure while across an imaginary county line the same road is assessed at a wholly different figure, while there is no perceptible or real difference in the character of the property or its earning capacity. In one instance within my knowledge a railroad was assessed at $6000 a mile. The board raised the assessment to $9000 a mile. On hearing before me in the district court it was conclusively shown that the actual cost of the road was less than $6000 a mile, yet in the absence of allegations authorizing interference by corrective decree the road was compelled to pay on the value fixed by the board.

In treating the question in the light of the recognized and controlling maxim and principle "the law as it oftentimes was the end, and the remedy," the query naturally and legally arises, what changes and reforms are needed.

There should be some plain and simple statute providing for appeals to some tribunal vested with power to correct and control the arbitrary and oppressive action of the board of equalization. It is clear that the courts will afford protection and relief, but the tax-payer should not be compelled to resort to injunction or wait until he is sued and resort to cross action to get relief. Certainly the legislature can devise some simple, effective and constitutional method to reach and remedy this monumental evil and injustice. If it be said that such appeal would stop collection of taxes and embarrass the administration of the State and county governments, the answer is provided before such appeal can be taken that the tax must be paid

on the assessment as raised by the board, and leave the appeal in the nature of an action to secure a repeal and refund of the excess collected. Such tribunal might be provided in the form of a State board of appeal, equalization and assessment, to which all necessary power could be confided. Such tribunal, removed from legal surroundings, interests and influences, would be far safer and more satisfactory than any local board can possibly be.

To such State board there could be wisely committed the matter of assessment of all railroads and all telegraph and telephone lines. It is a matter of common knowledge that every year after the assessment rolls have been laid before the board of equalization, every corporation; whether a railroad, telegraph or telephone company, which pays taxes in a number of counties, finds it necessary to send an agent or agents from county to county within the limits of the time wherein boards of equalization sit, for the purpose of either securing the reduction of assessments or of preventing improper increase of the same, and most often their efforts are fruitless. For making such assessments and for collecting the same, the assessors and collectors must be paid, and the sums required to pay them must be drawn from the public treasury every year while taxes are levied, which means for all time to come. This is a wholly unnecessary burden of expense, and can be easily avoided; and if there be now any constitutional obstacle in the way of such avoidance, such obstacle should be removed.

Such State board, if it be created and if not, then the comptroller, could assess the property of all railroad, telegraph and telephone companies; and such assessment should not be made upon an ad valorem basis, but upon the basis of their gross receipts. This will remove the assessment from all local influences and effect practical and perfect compliance with statutory requirements that all taxation shall be equal and uniform.

The State board or the comptroller as the case may be, would have nothing to do with fixing values. The percentage of the gross receipts to be paid being fixed by law. All necessary to be done would be to obtain from the railroad commission the gross receipts of each company and from the same calculate the taxes to be paid by it. What percentage should be charged can readily be arrived at by ascertaining from one or more roads what their gross receipts have been for say five years past and also what they have paid in State and county taxes within the same time, and thus it can be readily ascertained what proportion of their gross receipts is required to meet their State and

county taxes. If it be found that one, two, or three per cent would be fair, let the same be fixed as the proportion of gross receipts to be paid. The plan and principle being adopted the details can be readily arranged.

By this plan all the expense of assessing and collecting the tax would be saved, all inequalities be avoided, and contests before boards of equalization would be a thing of the past. The taxes of the company would be adjusted to meet the fluctuation of their business, decreasing in the time of dull business and increasing when business was good and receipts heavy. The taxes should be paid directly to the comptroller and he could then apportion them to each county according to the miles of road or wire in such county and the commissioners courts could in turn apportion it among the various funds in the county treasury. Under such system the comptroller could as accurately estimate the probable revenues as he is now able to do.

While every citizen, natural and artificial, should be required to bear his fair and equitable proportion of the burdens of the government no citizen should be placed in such position as to be required to either submit to oppression or resort in each recurring year to the courts for protection against the arbitrary action of a body created and organized with the view that it should fairly and equitably adjust values so that the burden of government will be fairly distributed.

Such laws and conditions as make such action on the part of the tax-payer necessary might have been excusable in primitive times, but they are now unpardonable anachorism in this enlightened day and generation.

SOME FEATURES OF THE UNIFORM BANKRUPTCY LAW.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

JUDGE GEORGE E. MILLER.

OF THE WICHITA FALLS BAR.

(DISTRICT JUDGE, THIRTIETH JUDICIAL DISTRICT.)

Mr. President and Gentlemen of the Texas Bar Association:

At first it was my intention to choose for my subject the uniform bankruptcy law which was passed by the history-making Congress which has just adjourned, but when I read the bill and began to investigate my subject, I saw that if it was properly treated it would require a paper of greater length than would be suitable to read before a meeting of the Bar Association, and I changed my plan and selected for a subject, "Some Features of the Uniform Bankruptcy Law." A consideration of it will necessitate a brief review of the former bankruptcy laws of the United States, and the bankruptcy and insolvency laws of England.

The problem of the collection of debts, and the equitable distribution of the estate of a failing debtor, has always been a puzzling one to commercial people. It has been solved in various ways by people in different stages of civilization, from the barbarous and cruel method authorized by the "Twelve Tables" of the Roman law, whereby the creditors of a ruined debtor "might cut his body in pieces and each of them take his proportionable share" (2 Blackstone Comm., pp. 472-3), to our last uniform bankruptcy law. In China, at the present time, the laws provide that a failure of from $1500 to $5000 may be punished by

banishment, and from $5000 upward by summary decapitation. By the laws of Russia, a fraudulent bankrupt may be banished to Siberia. The writer is unable to say how effective these means of collection have proven to be, but it is certain that the prospect of suffering these punishments is enough to deter a timid man from embarking in trade.

The first English statutes upon the subject of bankruptcy were enacted in the year 1542, and are known as 34 and 35 Henry VIII, chapter 4. This enterprising monarch, not content with inaugurating a system of divorces which would put the statutes of the Dakotas and Oklahoma to the blush, and with re-organizing the church, must needs busy himself with the laws of trade. The writer has not access to a copy of the original acts, but from the text of learned commentators they were, at first, directed mainly against frauds of traders. (Bouv. Law Dic., Ed. 1883, Vol. I, p. 229, Title, Bankruptcy; Blackstone Comm., Book 2, p. 471.) Blackstone defines a bankrupt to be "a trader, who secretes himself, or does certain acts, tending to defraud his creditors," and states, "he was formerly considered merely in the light of a criminal or offender." (2 Black. Comm., p. 471.) The later English statutes took a more humane view of his misfortunes, and regard him as the victim of accident or circumstances rather than as a willful swindler. Up to the time of the passage of 32 and 33 Vic., ch. 71, which took effect on the 1st of January, 1870, the English law recognized no failing debtors as coming within the operation of the bankruptcy laws except traders, and those engaged in similar pursuits. (Cooley's Black. Comm., book 2, p. 474, note 2.) The act 5 George II, ch. 30, specially excepted from the operation of the bankruptcy laws, "farmers, drovers and graziers," for, while these might be sellers they could not, in the nature of things, be buyers, and hence could not be, technically, traders." (2 Black. Comm., p. 475.) Indeed, the etymology of the word, *bancus ruptus*,—a broken table or counter, hence a broken or ruined trader,—indicates that it was not intended that any but men engaged in strictly commercial pursuits could receive the benefits or suffer the injuries of the bankruptcy laws. Chancellor Kent observed this distinction when he said, "bankruptcy * * * has by long and settled usage received an appropriate meaning, and has been considered to be applicable only to unfortunate *traders*, or persons who get their livelihood by buying and selling for gain, and who do certain acts which afford evidence of an intention to avoid payment of their debts." Judge Storey defines a bankrupt as "a broken up and ruined trader, according to the origi-

nal signification of the term; a person whose table or counter of business is broken up, *bancus ruptus.*" Everett vs. Stone, 3 Storey's Reports, 453. (U. S. Circ. Court, 1st Circuit.)

The constitution of the United States provides, "The Congress shall have power * * * To establish * * * uniform laws on the subject of bankruptcy throughout the United States." (Art. 1, Sec. 8, Cl. 5.) It will be observed that the power to pass uniform laws on the subject of *Insolvency* is not delegated to Congress, and as the government of the United States is "one of enumerated powers," if the power to pass such laws is not given to Congress by the constitution, then it has no such power. Cooley's Const. Lim., 5th Ed., p. 10, and authorities there cited. Before the passage of the law under discussion Congress had exercised this power granted by the constitution, three times, viz: by act of April 4th, 1800, repealed December 19th 1803; by act of August 19th, 1841, repealed in 1843; by act of March 2d, 1867, repealed June 7th, 1878, to go into effect September 1st, 1878. The first of these acts applied only to those engaged in commercial pursuits. 2 Kent's Comm. p. 391, note a. The second applied "to all persons whatsoever residing in the United States, who owed debts amounting to over $300, not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary character." This act, if constitutional, broke down one broad and well defined distinction between bankruptcy and insolvency. There seems to be some room for controversy as to whether that part of the act referring to others than traders is constitutional. So far as the researches of the writer have extended, no case has been found where the Supreme Court of the United States has passed on the constitutionality of this question. In the cases of Kunzler vs. Kohaus, and of Sackett vs. Andross, 5 Hill's N. Y. Rep., 317, 327, a divided court held the Act of 1841 constitutional. Some of the circuit courts of the United States have passed on the question, and held the acts constitutional. In re California Pac. R. R. Co., 3 Sawy., 240, Justice Hoffman, of the United States District Court, in discussing the question herein raised, as applied to the Act of 1867, uses this language, viz: "the question of the constitutionality of the provision of the bankrupt act which applied to persons other than merchants and traders is not longer open to discussion," and again, "in fact, the power of Congress over the subject of bankruptcy is subject to no other restriction than the requirement that its laws be uniform. It is not to be guaged or limited by the British statutes of bankruptcy which

were in force at the time of the adoption of the constitution. Although by those statutes, as then in force, the bankruptcy laws applied only to persons engaged in trade, Congress is not obliged to limit its laws on the subject of bankruptcy to merchants or traders." I am unable to agree with the reasoning of the learned judge who delivered that opinion, nor do I think that his opinion settles the question. We now have the Circuit Courts of Appeal and the Supreme Court of the United States whose sole business it is to reverse the opinions and judgments of the district courts unless they are supported by the law. It is very true that inasmuch as the bankruptcy laws of England were not part of the common law and were never re-enacted by Congress, the power of Congress is not to be "gauged or limited by them;" but they cannot be ignored when we are seeking for a correct definition of a word, any more than we can ignore the definition given by a standard lexicographer, or the sense in which the word is used by the best and most correct writers. Except when the word "bankrupt" is used in a figurative sense, as in Act IV, Sc. 2, of Shakespeare's Comedy of Errors, or in Cowper's Valediction, I venture the assertion that no English scholar has ever used the term in any other sense than as applied to traders. Macaulay is justly regarded as one of the very best writers of pure and correct English, and he invariably used the word as applied to traders. Hist. of Eng., Ch. IX, XV. No standard dictionary can be found published any time from 1776 to 1840 which gives any other definition than one confined to or connected with traders. Every law writer and judge who attempted a definition of the word up to the time of the passage of the Act of 1841 confined it to persons engaged in commercial pursuits. The editor of Kent's Commentaries, 10th Ed., published in 1860 (Wm. Kent, Ed.), says that "the provision in the bankrupt act (of 1841) which rendered it a general insolvent act, and was the one almost exclusively in operation, gave occasion to serious doubts whether it was within the true construction and purview of the Constitution, and it was that branch of the statute that brought the system * * * into general discredit and condemnation, and led to the repeal of the law." Page 514. Considering these expressions of doubt by an eminent law writer, and the general discussion as to the constitutionality of that part of the Act of 1841, it is rather strange that the point was not authoritatively passed upon by the Supreme Court under the Act of 1867. It is possible that court decided the question and that the decision has escaped the attention of the

writer, who has examined only the Digests of the Supreme Court Reports (U. S.), and Cooley on Constitutional Limitations. It is true that in the case of the New Orleans, S. F. & L. R. Co. vs. Delamore et al., 114 U. S., 501, in a rather negative way the court held that a railroad company could be adjudged a bankrupt, under the Act of 1867, but the constitutionality of such adjudication does not seem to have been before the court, and does not seem to have been raised. The language of the learned judge who delivered the opinion of the court (Justice Woods) is as follows, viz: "The jurisdiction of the bankruptcy court to adjudicate a railroad bankrupt and to administer its property, under the bankrupt act, has been passed upon by several circuit courts of the United States. Adams vs. Boston, H. & R. Co., 1 Holmes, 30; Sweatt vs. Boston, H. & R. Co., 5 N. B. R., 234; Alabama & C. R. Co. vs. Jones, 5 N. B. R., 97; Winter vs. Iowa, etc. Ry. Co., 2 Dill, 487. No circuit court before which the question has been brought has denied the jurisdiction. As they were courts of last resort upon this question, and valuable rights may depend upon their judgments upon this point, we think the question should be considered settled by the authorities cited, and are unwilling at this late day to re-examine it, especially as we have no jurisdiction to do so, except in a collateral proceeding like the present." This decision was rendered May 4th, 1885, seven years after the repeal of the Act of 1867. I have not access to the circuit court reports referred to, and am unable to say whether the constitutionality of the act was called in question in those cases, or whether the question was simply as to the jurisdiction of bankruptcy courts, under the act, to adjudge a railroad bankrupt. The question before the court in the Delamore case was as to the validity of a sale under proceedings in bankruptcy, and the court seem to have rested its decision on the grounds of public policy and the danger of interfering with vested property rights so long after the repeal of the law by virtue of which they were acquired. We cannot assume that the decision would have been the same if the Act of 1867 had been in force at the time of the rendition of the opinion, and the constitutional question had been raised.

Under the Act of 1867, as well as under the Act of 1898, it is clear that the Supreme Court had jurisdiction to pass on any constitutional question properly raised. Sec. 25b 1 & 2. It is certain that at the time of the adoption of the constitution the word "bankruptcy" implied the idea of trade as contradistinguished from other pursuits. It is equally certain that Con-

gress could not afterward, by legislating a different definition for the term, change its meaning as it was at the time of the adoption of the constitution. "'Bankruptcy' is the state or condition of a bankrupt."—Bouv. Law Dic. The word "insolvency" has a much broader and, in some respects, very different meaning. Blackstone defines it as "the state of a person who is insolvent or unable, from any cause, to pay his debts."—2 Bla. Com., 285, 471. Kent says it is the state of one "who is unable to pay his debts as they fall due in the usual course of trade or business."—2 Kent, 389. As defined by the United States Circuit Court for the second circuit, it is "inability to pay commercial paper in the due course of business."—10 Blatch., 493. If this constitutional question has never been decided by the Supreme Court of the United States, it may prove a very fruitful source of litigation under the Act of 1898.

From the 1st of September, 1878, to the passage of the Act of 1898, there has been no uniform system of bankruptcy in the United States. Several of the States have attempted to pass laws calculated to take the place of uniform bankrupt laws, but they have been so hedged about by constitutional limitations that they have not generally been satisfactory. While the constitution vests Congress with the power to pass bankruptcy laws, that power is not an exclusive one and the States have retained the power to pass such laws in the absence of its exercise by the United States. Sturges vs. Crowninshield, 4 Wheat., 122; Ogden vs. Saunders, 12 Wheat., 213; Cooley's Const. Lim., p. 358. Under State bankrupt laws "foreign creditors and creditors in other States cannot be barred while State creditors may be." 2 Kent, 523, note; Cooley's Const. Lim., p. 358. Therefore such legislation is manifestly against the interest of the citizens of the State which passes such laws. In 1879 the legislature of Texas passed the act known as the general assignment law, and in 1883 it was amended. By many of the profession it was thought that this act would prevent debtors from making preferences between creditors. But when the Supreme Court of Texas decided, in the case of La Belle vs. Tidball, Van Zandt & Co., 59 Texas, 292, that the assignment act did not repeal the act concerning fraudulent conveyances, and that preferences given by instruments other than such as evidenced an intention to make a general assignment, were not invalid, unless made under such circumstances as would invalidate them under the statutes concerning fraudulent conveyances, which doctrine was re-affirmed and followed in Watterman vs. Silberberg, 67 Texas, 100, and in other cases, the assignment law became prac-

tically a dead letter and since that time there have been very few assignments under the statute. This law contains several features which are commendable for their fairness. By its provisions the failing debtor, who attempted to make an assignment, was compelled to convey the whole of his estate subject to execution, and the creditors were to share it in proportion to the amount of their claims. If he preferred, he could make the assignment for the benefit of such of his creditors as would consent to release him, and if his estate paid two-thirds of his indebtedness to such consenting creditors, he was discharged from the balance due them. Of course under the constitution, this discharge could not be enforced against non-resident creditors, unless they participated in the assignment and accepted their proportion of the estate, in which event the law was as binding on them as on resident creditors. Cooley's Const. Lim. (2nd Ed.), p. 358; Clay vs. Smith, 3 Pet., 411; Baldwin vs. Hale, 1 Wall., 223; Gilman vs. Lockwood, 4 Wall., 409. Since the practical abolition of the general assignment law in favor of preferential deeds of trust, which are never made by any except an insolvent debtor, and which have become such convenient disguises for fraud that they have become a stench in the nostrils of honest men, there has been no practical way whereby an insolvent's estate in Texas could be equitably distributed among his creditors.

The present bankruptcy law has come at a very opportune time. Coming, as it has, after the disastrous real-estate booms which swept over the whole country and wrecked many honest and enterprising men, and the terrible financial panic of 1893, which crushed many more, it will be hailed with gladness by thousands, who wish to see these unfortunates given another chance in the battle of life, and will be an incalculable relief to many who have been struggling under a burden of debt for years, and will be only too happy to give up all they have for the privilege of making another start in life. Nothing can possibly be so discouraging to enterprise and paralyzing to industry as the knowledge that just as soon as one can accumulate a little more than enough to furnish him the bare necessities of life, there will be a crowd of hungry creditors waiting to annihilate it with executions; that so long as he has sufficient honesty to refrain from committing willful and corrupt perjury he will be a hewer of wood and drawer of water for some who happened to be on the right side of the market at the crucial time. I speak of this law with reference to honest debtors, be-

cause if the intent and purposes of the act are carried into effect the dishonest debtor can derive no benefit from it.

The first section of this act is known as the dictionary clause, and defines the terms and words used in the bill. Some of these definitions are not materially different from the sense in which such words have been heretofore used; others are materially different. The word "bankrupt" is defined in the law to "include a person against whom an involuntary petition or an application to set aside a composition or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;" and again, "a person shall be deemed insolvent * * * whenever the aggregate of his property, exclusive of any property which he may have conveyed, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." "'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such debt for which some indorsee, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets." But if the security, as used herein, for want of record or other reasons would not be good against subsequent creditors or purchasers without notice, then it does not constitute a lien against the estate of the bankrupt (Sec. 67), and a creditor holding such security is not a secured creditor, as that term is used in this act. The term "secured creditor" will not include one who has only personal security for his debt, unless the surety is secured by the property of the bankrupt. Evidently this definition was inserted for the benefit of those who have become responsible for the bankrupt's debts and who have no security on the property of the bankrupt. The definition materially affects the status of the creditor at creditors' meetings, in this, that creditors who have personal security, only, are allowed to vote at such meetings, and "secured creditors," as herein defined, cannot do so unless their claims exceed the value of their securities, and then only for the excess. Sec. 56b. At creditors' meetings the votes are in proportion to the amount of the unsecured claims against the bankrupt, and only those creditors can vote whose claims have been allowed by the court, or by the referee if the case has been referred.

The next chapter of this law (Ch. II) treats of the creation of bankruptcy courts and their jurisdiction, which is substantially

the same as former bankruptcy laws. Of course all estates of bankrupts must be administered in the United States courts.

Chapter III, Sec. 3, defines what are acts of bankruptcy. These are five, viz:—"having (1) conveyed, transferred, concealed or removed; or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." The first of these subdivisions contemplates dishonesty on the part of the bankrupt, and for that reason the things mentioned therein constitutes acts of bankruptcy, whether the subject is solvent or insolvent; but if upon a hearing, before a jury, if the bankrupt demands it, the alleged bankrupt shall prove his solvency, and the burden is on him to do so, then the proceedings against him shall be dismissed. Sec. 3c. It seems that it would not be inequitable to refuse to discharge a person from his debts if he has committed any of the acts of bankruptcy mentioned in the first subdivision, because of the elements of fraud it contains, but the act contemplates that the guilty may repent, and he is entitled to discharge if his subsequent acts are free from blame. All of these except those mentioned in the fifth subdivision constituted acts of bankruptcy under the Act of 1867, and there were these others, viz:—(1) "Departing from the State, territory or district of which the person is an inhabitant, with intent to defraud his creditors; (2) remaining absent when abroad with like intent; (3) concealing himself to avoid legal process; (4) being under arrest for a period of seven days on an execution upon an act provable under the act, and for more than one hundred dollars; (5) being actually imprisoned for more than seven days in a civil suit founded on contract, for $100, or upwards; (6) a banker, broker, merchant, trader, manufacturer or miner fraudulently stopping or suspending, and not resuming payment of his commercial paper within a period of fourteen days." So far as this Act of 1898 may affect Texas, the first three subdivisions last above mentioned, may constitute acts of bankruptcy now, because their effect is to

afford ground for the issuance of attachment (R. S., 1895, art. 186, subdivisions 2 and 4), which, if followed, will cause an act of bankruptcy under the third subdivision of the Sec. 3a, Act of 1898, unless the defendant in attachment shall vacate it at least five days before sale day. Inasmuch as in Texas there can be no arrest or imprisonment for debt in a civil action (Const. of Texas, art. 1, sec. 18) the 4th and 5th subdivisions last above named could not affect our citizens even if they were acts of bankruptcy under the law of 1898. It is difficult to conceive how one could *fraudulently* stop the payment of his commercial paper without giving cause for attachment under our laws; so it seems that the omission of the 6th subdivision last above mentioned is immaterial and that the acts of bankruptcy, so far as Texas is concerned, are practically the same under the Act of 1898 that they were under the Act of 1867. The specification of the acts of bankruptcy seem to be dictated by a spirit of justice and fairness. Of course if a debtor is trying to act dishonestly with his property, the law ought to provide means for the protection of his creditors before it is too late. If it be conceded that in justice and equity one creditor has as much right as another to the estate of an insolvent—and this cannot be denied—then, when an insolvent is so far gone that he is trying to prefer some of them, the law should step in and administer his estate for the benefit of all his creditors. The 4th subdivision was evidently inserted for the benefit of the assignor, for it is not probable that his estate would be better administered through a referee and trustee than it would through a bonded assignee under the statute. If the debtor is solvent and, in fact, is not trying to prefer his creditors, he cannot be irreparably injured, because he can only be required to answer the petition, and his property cannot be taken from him unless the petitioner shall file a good and sufficient bond to pay costs, damages and expenses—which includes counsel fees to be allowed by the court—if the petition is dismissed or withdrawn, and he has the right to have a jury pass on the question of his solvency, or any act of bankruptcy he is alleged to have committed. The burden of proving solvency is on the respondent, which is right, for the facts must be peculiarly within his own knowledge. Requiring a bond, in case property is seized, will discourage the reckless filing of involuntary bankruptcy proceedings. It seems the law would be improved if it required a similar bond even if no application is made to seize the debtor's property, as was required by Senate bill 1035 as amended by the house, because the institution of bankruptcy proceedings

will necessarily injure the respondent's credit, whether they are sustained or not, and an honest debtor might be put to great annoyance, inconvenience and expense by a creditor who is solvent but execution-proof. Insolvency *per se* does not constitute an act of bankruptcy, but it will be easily seen how it may cause one, for if an insolvent suspends payment and a creditor institutes legal proceedings against him, these will soon ripen into an act of bankruptcy.

Any natural person, who owes a debt, whatever the amount may be, may become a voluntary bankrupt. Corporations are specially excepted from the operation of the voluntary feature of the bankrupt law. The reason therefor, perhaps, lies in the fact that they cannot be benefited thereby—a corporation has no exemptions and to entitle it to a discharge it must surrender all its property and have nothing left but its charter and a name, which would be a burden. By dispossessing itself of its property "it *destroys itself*, and becomes *ipso facto* dissolved, and, in fact, is regarded as a dissolved corporation for many purposes, having reference to the rights of creditors" (Thomp. Corp., Vol. 5, Sec. 6496; Id., Vol. 3, Sec. 3345); and it cannot hope to acquire more property, while a natural person may make a new start and again acquire property.

"Any natural person, except a wage-earner (and he is one who works for hire at not exceeding $1500 per year), or a farmer, or a person engaged chiefly in farming or the tillage of the soil, any unincorported company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits owing debts to the amount of one thousand dollars, or over, may be adjudged an involuntary bankrupt." "Private bankers, but not National and State banks, or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." It is easy to see why National and State banks should be excepted from the operation of this law, because the laws under which they are created provide for an equitable distribution of their assets in case they become insolvent. No new rights, as against them, could be acquired by a bankruptcy law—only the procedure might be changed and the administration of their estates had through the federal courts, instead of through the treasury department, in the case of national banks. It is not so easy, however, to divine why other corporations than those mentioned should not be subject to this law. If an unincorporated company or a partnership should be engaged as common carriers, or in the business of operating telegraphs, or telephones, or in many other lines of employment

for which corporations may now be organized, then such unincorporated company or partnership may be adjudged an involuntary bankrupt under this law. But, if the same persons, with the same capital, engaged in the same business, prefer to operate such business under a charter as a corporation, then the bankrupt law does not apply to their business. If the law, in so far as it applies to others than traders and trading corporations, is constitutional, then no valid reason can be urged why it should not apply to all corporations, as well as those mentioned in the act. Why should a railroad corporation, for instance, have privileges not accorded to manufacturing, printing or publishing corporations? Creditors of railroads ought, in justice and good conscience, to have as many advantages in collecting their debts as creditors of the corporations mentioned. The exception is certainly to the benefit of the excepted corporations, as the exception of wage-earners and farmers is to their benefit. Under the practice in receiverships, as it obtains at present, there seems to be no method of forcing a railroad to meet its obligations promptly when it is not inclined to do so. In a great many instances large properties have been operated by receivers, who are simply arms of the court, and the payment of debts, except the running expenses and the salaries of the receiver and his counsel, have been postponed till the creditors have been glad to make most any kind of a compromise and give nearly any kind of extension, and after these troublesome matters have been settled the properties have frequently been turned back to the owners without sale. No one can claim this is right and just. Then, too, the courts of many States have held that insolvent, non-going corporations may prefer creditors, and some have even gone so far as to hold that they may prefer their own stockholders, and even their directors who created the debt. Our Supreme Court—be it said to their credit, and to the credit of the able, learned and high-minded judges who composed it—took a higher ground, and expressed the doctrine which, Mr. Seymour D. Thompson says (Thomp., Corp., Sec. 6492), "is the only one which is deserving of any respect," that "the assets of an insolvent corporation which has ceased to carry on business, and does not intend to resume, is a fund from which all creditors, not secured by valid liens existing before the condition was fixed, have the right to be paid on terms of perfect equality." Lyons-Thomas Hardware Co. vs. Perry Stove Manufacturing Co., 86 Texas, 144. So that so far as the distribution of unencumbered assets are concerned, Texas corporations could not be affected by the bankruptcy law. The bankruptcy bill introduced

in the last Congress, known as Senate Bill No. 1035, as amended by the house, clearly included all corporations, except national banks, within the provisions of its involuntary features. In it there were only three exceptions to its involuntary features, viz: (1) wage earners, (2) farmers, and (3) national banks. In many essential features, this bill was identical with the act passed, and in many other respects it was very similar. It is highly probable that the inclusion of railway, express, telegraph and telephone companies within its provisions caused its defeat. It may be that the railroads and others preferred receiverships to bankruptcies, that they would "rather endure the ills they had than to fly to others they know not of."

Nor can any good reason be urged why farmers should be excepted from the operation of the involuntary features of the law, and persons engaged in the cattle industry be subject thereto. If the exception of farmers was secured by patriotic Congressmen who are seeking re-election, some of our western Congressmen are likely to be called upon to explain why the sun-bronzed, storm-swept cattlemen were not also excepted. The latter may have about as many corns in their hands as the former, and if they have not hayseed in their hair, some of them have grass burrs.

Partnerships may be adjudged to be bankrupt, in which event the act prescribes how the partnership and individual property shall be administered, and it does not change the rights of the creditors of the partnership and its members as they have heretofore existed. In case any of the members of a partnership are not adjudged bankrupt, the partnership property shall not be administered in bankruptcy except by consent of those not so adjudged; but the solvent partner shall settle the partnership business as rapidly as possible and account for the interest of the bankrupt. Sec. 5h.

Exempt property is not affected by the bankrupt law. Sec. 6a. Under the Act of 1867, there was exempted to the bankrupt certain property mentioned therein and such "as would be exempt by the laws of the State in force in the year 1864. Act March 2, 1867, Sec. 14. Neither will the bankrupt law affect the allowance, under the probate laws, to the widow of a bankrupt in case of his death pending the bankruptcy proceedings. Sec. 8.

The act provides (Sec. 11) that suits founded upon claims for which a discharge would be a release, pending at the time of the filing of the petition in bankruptcy, shall be stayed until after an adjudication or dismissal of the petition; and if the person is adjudged a bankrupt they may be further stayed for

twelve months unless the question of discharge be sooner determined. Suits instituted by the bankrupt need not be dismissed, but the trustee of the bankrupt may prosecute them to their determination. After the lapse of two years after his estate has been closed, suits brought by or against the trustee of a bankrupt estate are barred. Sec. 11d.

After the bankrupt has been examined in open court, or at a meeting of the creditors he may make a composition with his creditors, which will be confirmed if "(1) it is for the best interest of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as provided by law, or by any means, promises, or acts forbidden by the law" (Sec. 12a, b, c, d), and upon its confirmation and the distribution of the estate, the case shall be dismissed, and the bankrupt discharged. Sec. 12e, 14c.

At any time after one month and within twelve months after an adjudication of bankruptcy the bankrupt may apply for his discharge, and in exceptional cases he may apply within eighteen months, but not afterwards, and unless it be found that (1) "the bankrupt has concealed, while a bankrupt, * * * any of the property belonging to his estate in bankruptcy; or (2) made a false oath, or account in, or in relation to, any proceeding in bankruptcy," or (3) "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained (Secs. 14b, 29b), he may be discharged from all his debts, except (1) taxes, (2) judgments in actions for frauds, or for willful and malicious injuries to the person or property of another, or (3) where created by fraud, embezzlement, misapplication, or defalcation while acting as an officer, or in any fiduciary capacity. Sec 17a. This discharge will be revoked if it was obtained by fraud, and the actual facts do not warrant the discharge, it it be attacked within a year. The discharge of a bankrupt from his debts, does not seem to depend at all upon his estate having been administered, or upon his having any estate to administer. The former bankruptcy acts required that the estate of the bankrupt should pay a certain per cent of his indedtedness, or that he should have the consent of a certain portion of his creditors before he could be discharged. With a provision of this kind a bankrupt law would be of very little benefit to a great many honest debtors who sadly need some kind of relief. The

act contemplates that the bankrupt may be discharged only from honest debts, when the judgment discharging him shall have been honestly obtained. In addition to having his discharge refused, the bankrupt is liable to a criminal prosecution for doing the things forbidden by the first two subdivisions above. Sec. 29b.

The next section relates to the courts and practice, and certain rules of evidence, which it is not material to discuss specially. The United States courts have no more jurisdiction between trustees for bankrupts, as such trustees, and adverse claimants for the property than they would have between the bankrupts and their adverse claimants, *i. e.*, if the controversy is not such that it could be brought in the federal courts in the first place, or removed there if brought in the State courts, then they shall not be brought in the U. S. courts, but in the State courts. Sec. 23a. All suits by the trustee shall be brought or prosecuted only in courts where the bankrupt might have brought them if bankruptcy proceedings had not been filed, unless by consent of the proposed defendant. Sec. 23b. This latter clause seems an innovation upon the rule that jurisdiction cannot be conferred by consent. These provisions remove one objection which has been urged against bankruptcy laws, that they confer too much power on the federal courts, because these courts have no jurisdiction over any but the bankruptcy proceedings themselves and of offenses growing directly out of them, unless further jurisdiction is conferred by consent of parties; and they have no jurisdiction, except by consent of controversies that might have arisen if bankruptcy proceedings had not been filed.

The section concerning appeals and writs of error will not receive extended notice here, for the reason that this paper has already grown to greater length than I intended it should when I began it. The appellate courts only have jurisdiction to review questions of law arising in bankruptcy proceedings. Sec. 24b.

The act creates the offices of referee and trustee. The referees are to be appointed by the courts of bankruptcy, and, to prevent the possible exercise of nepotism, those related within the third degree by blood or marriage, as determined by the common law, "to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed," are disqualified from being appointed referees. Sec. 35a3. To further insure their good behavior, they must

take the oath of office required of the judges, and give bond in the sum of five thousand dollars. The bankruptcy courts shall appoint such number of referees as may be necessary to expeditiously transact such bankruptcy business as may come before such courts (Sec. 37), and they must so designate the limits of referees' districts "that each county, where the services of a referee are needed, may constitute at least one district." Sec. 34a. The referee is a kind of a "deputy bankruptcy court," and upon the reference of a case to him may perform nearly any function the court can perform, subject at all times to a review by the court, except that he cannot punish for contempt committed before him, which must be done by the court. Secs. 38, 39a, 41a, 41b. If the bankruptcy courts do their duty in appointing a sufficient number of referees, instead of trying to create a few lucrative offices for some of their close friends, as their relatives are not eligible, then these courts will be brought close home to the people, and their administration can be made quite economical. The records of cases heard by referees must be very complete, and when a request to that effect is made, an agreed statement of the facts must accompany them, so that the court may the more intelligently revise their adjudication. Secs. 39a, 42a, b, c.

The creditors of a bankrupt have the right to appoint a trustee to manage his estate, and in the absence of an exercise of this right the court shall appoint one. There is no such limitation upon his appointment as there is upon the appointment of the referee, and any relative of any of the judges may hold this position. It is assumed that when the majority of the creditors of a bankrupt have agreed upon a trustee, he will be a fair, competent man, and they have the right to fix the amount of his bond, further insuring his good behavior. Secs. 45a, 50b, c, d, e, f, g, h.

When a person has been adjudged bankrupt, all his property of whatever kind, except what is exempt from forced sale, passes to the bankruptcy courts or to one of its arms; all suits pending against a bankrupt, whose judgments would be released by a discharge in bankruptcy, are stayed (Sec. 11); all preferences given by the bankrupt, whether by contract, or by means of legal process within four months before the filing of the petition against him, are voidable at the instance of the trustee (Sec. 60a, b, c); all property on which a valid lien has been given, and the registration laws complied with, shall be reduced to money, and if a surplus remains after paying the secured debt, it shall be distributed among the unsecured creditors; and

if not sufficient to pay the secured creditor, then the latter can share in the distribution of the estate for the unpaid balance; and if the debtor has, in contemplation of the filing of a petition either by or against him, transferred money or property to an attorney for services to be rendered, the transaction shall be re-examined by the court at the instance of the trustee or any creditor, and allow to such attorney only what shall seem to him to be a reasonable fee. From this it will be seen that lawyers, who are usually favorites with the gods and men, have no special privileges under the bankrupt law.

The trustee shall not be vested with an absolute discretion as to the sale of a bankrupt's estate and the price to be fixed thereon; the estate must be appraised by three disinterested appraisers, who shall be appointed by the court. The property shall be sold subject to the approval of the court when this is practicable; and in any event it must not be sold for less than seventy-five per cent of its appraised value without the approval of the court. Sec. 70b. The creditors of a bankrupt are the ones most interested in having the estate sold for the best price, and it seems to me that it would be an improvement to have them appoint the appraisers, as they are allowed to appoint the trustee. No provision is made for the payment of any fees to the appraisers, which will remove the danger of those duties being performed by incompetent persons looking for a job. The appraised value of an estate is a matter of indifference to the bankrupt, except as he may feel a pride in seeing his creditors paid as nearly in full as is possible.

Under the Act of 1867, the title to the estate of a bankrupt vested in the trustee, or assignee as he was then called, as of the date of the filing of the petition in bankruptcy. All transactions of the bankrupt with relation to his estate after that time were absolutely void as to the trustee. In re Gregg, 3 B. R., 131; Mays vs. Manufacturers' National Bank (S. R.), 55. Necessarily this caused much confusion and considerable loss to innocent parties. One contemplating a business deal with another did not dare to make the trade without consulting the clerk's office to see if a petition in bankruptcy had been filed, and even then such petition might be filed pending the negotiations, and the purchaser from the bankrupt might thereby lose the property he had paid for. There was absolutely no safe way or place to deal with a person who might become bankrupt except in the clerk's office, and in the presence of the clerk and all of his deputies. This, however, was mild compared with the English statutes of bankruptcy, whereby the title vested in the assignees

of the bankrupt as of the time he committed the first act of bankruptcy. This harsh rule yields in unreasonableness to the French system, whereby every act of the bankrupt with relation to his property *for ten days before* the commission of an act of bankruptcy is presumed to be fraudulent and void. 2 Bla. Com., 485, 486. By the terms of the Act of 1898, the trustee is vested with the title to the estate of the bankrupt as of the date of the adjudication in bankruptcy. Sec. 70a. This is just to all parties. No one can determine with certainty whether the respondent will be adjudged a bankrupt till the court or referee shall have heard the evidence and passed on the issues. The bankrupt can retain his property, and convey a perfect title to it up to the time he is adjudged a bankrupt, and there can be no uncertainty on the part of the purchaser as to whether he is getting something or nothing. Of course this presupposes good faith and not a fraudulent transaction. Nor is this unjust to creditors, because if the bankrupt is neglecting his property so that it will deteriorate in value, or if the creditors wish to take charge of and hold the property they may do so upon filing a proper bond (Secs. 3e, 69a); and the property shall be turned back to the bankrupt, provided he will file a proper bond (Sec. 69a); and thus the rights of all persons will be protected.

Prior to the year 1870, the English bankruptcy laws were very cumbersome and expensive. They seem to have been conducted on very much the same lines that some modern receiverships are conducted on. In 1801, when Lord Eldon succeeded to the great seal, he remarked, that the "abuse of the bankrupt law was a disgrace to the country, and that it would be better at once to repeal all the statutes, than to suffer them to be applied to such purposes. There was no mercy to the estate. Nothing was less thought of than the object of the commission. As they were frequently conducted in the country, they were little more than stock in trade for the commissioners, the assignees, and the solicitor." The administration of the estates of bankrupts under the Act of 1867 was very expensive, and that, as much as any other cause, tended to bring it into disrepute. Under the Act of 1898, the referee will receive, as full compensation for his services, a fee of $10 and 1 per cent commissions on sums to be paid as dividends and commissions, and one-half of 1 per cent on the amounts to be paid to creditors on compositions (Sec. 40); and trustees shall receive, as full compensation for their services, $5 and such commissions on sums to be paid as dividends and commissions as may be allowed by the court, not to exceed 3 per cent on the first $5000 or less, 2 per cent on the second

$5000 or part thereof, and 1 per cent on such sums in excess of $10,000 (Sec. 48a); and the clerk shall receive a fee of $10 and no more (Sec. 52a); marshals shall receive the same fees they now receive for similar services in other cases (Sec. 52b). To these items of expense must be added, (1) the necessary and actual expenses incurred by officers in the administration of estates, to be approved and allowed by the court; and (2) the cost of the employment of a stenographer to take down and transscribe the proceedings in the examination of bankrupts, not to exceed 10 cents per folio (Sec. 38a5); and in cases of involuntary bankruptcy, one reasonable attorney's fee (Sec. 64b3).

When the estate of a bankrupt has been reduced to money, and all priorities, and costs of administration, and wages due to workmen, clerks and servants, which have been earned within three months before the commencement of the proceedings, not to exceed $300 to each claimant, and valid liens have been discharged to the extent of the property securing their payment, then the balance shall be distributed among the other creditors in proportion to the amounts of their respective claims. Debts owing to the United States, a State, county, district or municipality, as a penalty or forfeiture, shall not be allowed, except for the amount of the pecuniary loss sustained by the proceeding out of which the penalty or forfeiture arose, with reasonable actual costs occasioned thereby and such interest as may have accrued thereon according to law. Sec. 57j. This will have a direct effect on the penalty for a failure to pay taxes within the time prescribed by law.

Heretofore when a debtor has been in failing circumstances it has been a race of diligence between his creditors to see who could first seize his estate; and if he should refuse to give security to the first one of them demanding it, by executing a preferential deed of trust then the compulsory process of the law is invoked against him. When one creditor had pounced him, all the others followed suit. The result was that the unfortunate debtor, who might have recovered himself if given an opportunity, frequently had to submit to many suits in each of which the costs were as much as the administration of his estate in bankruptcy, and had the whole of his assets wasted and only one or two of his creditors satisfied. A creditor, although knowing that his debtor was honest and believing that he could pay if given an opportunity, did not dare to grant an extension for fear that some other creditor might get ahead of him. Often the creditor could not take time to fully investigate his debtor's condition because he might be beaten by some who did not care

to investigate. A creditor had not only to watch his debtor but all the other creditors as well. All this was very troublesome and the consequences frequently disastrous. Under the operation of the bankrupt law, there will be no such unseemly haste in grasping the estate of a debtor, for each creditor will know that he can secure only his proportion of the estate. Creditors will not be so eager to induce debtors to prefer them by an absolute conveyance of some part of his estate, or by making a deed of trust, for these will be acts of bankruptcy, and can be nullified by the trustee. It is true that the act is not perfect, and that it can be, and probably will be, improved by amendments; but it is much better than none. It has this advantage over other methods of collecting debts—the whole of the debts can be disposed of in one action, and if the debtor is honest he will receive his discharge after rendering up the whole of his estate, and if he is dishonest the creditors cannot get more than his estate by any method now known to the law. The act does not offer any encouragement to commit frauds. It seeks in many ways to prevent the commission of them. Certain it is that it cannot succeed absolutely in doing so—no human institution can—but it is a long step in that direction. Of course perjury will be committed in the course of administrations in bankruptcy—corrupt men will take almost any chances, when they are expected to run the gauntlet of the grand juries, the district courts, with the advantages of a fellow-feeling on the part of a jury of their peers, and the chances of a reversal by the Court of Criminal Appeals for some error in the course of the application of retributory justice, to avoid the necessity of meeting their obligations—but inasmuch as the offenses made punishable by this act are exclusively cognizable in the courts of the United States, the amount of perjury will probably be reduced to the minimum. Until the time shall come when the same punishment, equally swift, sudden, terrible and sure, that was meted out to Ananias and Sapphira for saying they had given up the whole of their estate when they had kept back a part, is meted out to debtors who perjure themselves in an effort to defraud their creditors, such frauds will be attempted; but when that time comes the millennium will have arrived, and we will not need a bankruptcy law or any other kind.

OUR COURTS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. JONATHAN LANE,

OF THE LAGRANGE BAR.

Mr. President and Gentlemen of the Texas Bar Association:

Having been invited by your committee to prepare a paper upon such subject as I might select, to be presented to this meeting of your association, I have hurriedly prepared this address which I now submit.

I have read and considered with disapproval criticisms of our courts which have appeared in many of our newspapers for the past several years. Our courts have been repeatedly charged by editorials and in communications by candidates and others, with being too tardy and too technical in the trial of criminal causes. These critics charge that mob-violence and lawlessness generally are attributable to these alleged conditions. With a few exceptions I deny the truth of such charges and contend that our courts are as speedy in the trial of causes as they can be under our system of government; that they are not more technical than the law and due regard for the liberties and rights of individuals demand. I also deny that mob-violence or other crimes are occasioned by any fault or lack of duty on the part of the courts. Our system of government differs essentially from monarchies. In the latter the rights of the government are more specially guarded by the courts than the rights of individuals; while in our government the rights and freedom of the individual are considered of paramount importance. Our

forms of procedure are intended as a means to protect the individual from wrong and oppression and thus incidentally to benefit the government. The security of our government is thought to rest upon the maintenance of the liberties of the individuals who constitute the government. Therefore entirely different rules of procedure must be adopted by the two systems. Monarchies have adopted and must have to a large extent personal government—a government of men—invested with large discretionary powers, as distinguished from a government of law. The monarchical maxim, "that the king can do no wrong" is readily extended to his official agents, and law is thus subordinated to personal government. With us, the reverse is the rule: Our officers have no power over the individual, except such as is expressly conferred by the law. Are we ready now to abandon our bill of rights to take from the people their inalienable rights; to abridge the constitutional guarantees and to substitute for our government of law a strong personal government? If so, we can have more speedy trials and less technicality. I for one prefer to retain our present system, fully believing in the time-honored doctrine, that it is better that ninety-nine guilty should escape than that one innocent man should be punished. I believe that the strength and perpetuity of our government depend upon a rigid enforcement of the bill of rights for the protection of the freedom of individuals, and that this kindles true patriotism of the people and the love of their own government. Would these critics force a man to a trial involving his life and liberty when his witnesses are not present and be is not ready to present fairly his defenses, although he shows that he has used every process allowed him by law to have them present, and that they are absent without his procurement or consent, that he has no other means by which he can prove the facts desired? These are in substance the facts required by the law to secure a continuance of a criminal cause. It may be said however that such showings are falsely made. That may be so, or it may not. In some instances it is so, but the trial judge is called upon to decide the matter at once upon the presentation of a motion for continuance. The motion is supported by the affidavit of the accused. The prosecuting attorney, generally, cannot contradict the existence of the facts alleged. What is the court to do under such circumstances? Must the judge assume that the defendant has perjured himself and that the facts alleged do not exist, and this without anything to prove such a conclusion to be true? Must he do what the law expressly says he must not do, i. e., presume that the ac-

cused is guilty of the charge preferred against him, and therefore that his affidavit is unworthy of belief? It seems that this is what some of those who criticise the courts would have them to do, thus making the judges violators of the law. With a few cowardly exceptions the judges follow the law and, if necessary, defy public sentiment. In this they should be commended; by such conduct they stand as the impenetrable shield of personal liberty. In a few instances some moral cowards have been elevated to the high position of district judge who violate the letter and spirit of the law by unjustly forcing men to trial in obedience to popular clamor. By this means they deny them their constitutional and statutory rights, and thus cowardly, by abuse of their power, deprive men of their liberty, disgrace their families and cause sheriffs to commit judicial murder. Such men, in my opinion, are the most harmful criminals on earth.

Concerning the complaint that our courts are too technical, it seems to me that many people who thus complain do not know what technicalities are nor understand their use. As I understand it all the rules of procedure prescribed by the constitution, our statutes, or adopted by the common law to govern the courts in the trial of causes are technicalities. It is possible that any one or even all of them may be disregarded and violated by the courts in special instances in the trial of causes, and still a correct judgment upon the merits of the case result, but who can ever know that a just judgment had been reached when the pleadings and proof are conflicting? Who can tell that the observance of the law would not have brought about a different judgment. The rules of the common law have existed as the very essence of good sense and justice so long that the memory of man runneth not to the contrary. The rules of procedure prescribed by our constitution and statutes are the result of the best thought of our legislators and statesmen. These rules, in the wisdom of the law-making power have been considered necessary in order to protect the lives and liberties of the people—hence, to ruthlessly disregard them is anarchy of the worst sort. The Constitution of Texas provides that no citizen of this State shall be deprived of his life, liberty, property or privileges, be outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land. Why have these provisions, unless necessary to attain the ends of justice? If a number of good citizens should see a man commit a foul murder, as dark and as cold-blooded as possible and know he is guilty of a capital offense, why not take him at once and hang him without the formality of a trial? Death by hanging is the

punishment fixed by law for such a crime. Such punishment is administered by the people, and if it be true that the forms of law are not to be obeyed by the courts why should we complain if the same punishment is meted out in a summary way by those who are not judges? The reason is we have a government of law, not of men. The law must be followed, and it is the highest duty of the judges and officers to see that it is obeyed, and all men must be condemned, if at all, by due course of the law of the land, or a great wrong has been inflicted. Our constitution provides that the accused shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof, yet it is altogether possible that he might be tried in his absence, without knowing that any charge whatever has been returned, and yet full justice be done in the case. He might be arrested only to be conveyed to the gallows or the penitentiary and still complete justice be done so far as the limit of punishment is concerned. Who would approve such a course? And yet the above requirements are only technicalities, forms prescribed by the law which these critics say should not be regarded. The bill of rights provides that no man accused of crime shall be required to give evidence against himself. He shall have the right of being heard by himself or counsel or by both. He shall be confronted by the witnesses against him, shall have compulsory process for obtaining witnesses in his favor, and shall not be tried for a felony unless he has first been indicted by a grand jury. All of these provisions are mere technicalities. If the critics are right why require their enforcement? An accusation of murder or robbery might be preferred against a citizen by a mere complaint; he might be arraigned and tried upon such complaint, all of the evidence for and against him be heard, the law properly charged and complete justice be done. On appeal, upon examination of every other incident of the trial and a thorough inspection of the evidence, the court finds that no injury so far as they could ascertain not justified by the law had been inflicted upon the accused, and yet would any sane man suggest that such a case should be affirmed, when the plain constitutional rights guaranteed by the bill of rights had been stubbornly disregarded by the trial court? Who can tell that the grand jury would ever have indicted the man upon the evidence? A defendant might be forced by the judge to give evidence against himself; he may be denied the right of being heard either by himself or counsel, damaging testimony might be received without requiring

the witnesses to confront him; he might be denied compulsory process for obtaining witnesses in his favor, and yet, upon the facts as they actually exist with a proper application of the law to those facts he might be properly condemned. On appeal, would any man suggest that such a case should be affirmed, merely because it might appear to the judges of the court of appeals that substantial justice had been reached? The law provides that a man shall be tried by an impartial jury, in cases of felony, consisting of twelve men. Suppose one or more of such jurors should declare when interrogated, that they disliked the defendant and were his enemies, and the trial judge should force him to accept them; and upon the trial he should be convicted and appeal his case; it appears to the court of appeals that substantial justice was meted out, should such a case be affirmed? Who can say that if these prejudiced jurors had not been accepted and others substituted in their place a mistrial would not have resulted or an acquittal followed? However, these requirements are mere technicalities or forms prescribed by the law. Suppose, instead of twelve, he should be forced to trial with nine jurors,—a mere technicality,—and yet substantial justice might be reached.

Without further enumerating these valuable rights secured to the citizens by the bill of rights and by the statutes of our State, it occurs to me, that these illustrations are sufficient to prove to any thinking man that in the trial of criminal cases the courts, from the lowest to the highest, should be required to conform to technical rules of procedure prescribed by the law. If the people elect incompetent judges, they should be required to suffer the consequences and thus from experience be more cautious.

I do not wish to be understood as contending that every formality must be followed exactly as it might be construed by the appellate court, but I do mean that in every instance an honest effort should be made by the trial court to comply with each and every one of these forms, and if it should appear on appeal, that it is possible that injury has resulted to the accused from their disregard, then the case should be reversed. If the trial court has complied with the forms so nearly correct as to indicate in the honest judgment of the appellate court that the accused is not prejudiced, then the case should not be reversed but affirmed. My observation afforded by fifteen years of active practice convinces me that it is seldom the case that a continuance is improperly granted the defendant. It also leads me to believe that it is rarely the case that the Court of Criminal

Appeals reverses a cause when it should not be reversed. As a result of the enforcement of the law we have constantly confined in the penitentiaries and in the various convict camps between four and five thousand men, an average of about one per cent of our adult male population. The penitentiaries are crowded and in order to utilize the labor we are compelled to hire out convicts to work upon farms and railroads. This vast number of convicts should satisfy the cravings of the most exacting. I believe we have as quiet and law-abiding a people as there are on earth—all due to our system of government which inspires love of country, and tends to a strict enforcement of the law on the part of the courts. Think of it! one man in each one hundred a convict. Compare the speed with which trials are conducted in our courts with those of New York, Illinois and other States. Think of the time consumed in the trial of the Haymarket murderers, the Luetgert case, the Holmes case and other similar cases! Take for example the result of appealed cases to the Austin term of the Court of Criminal Appeals for 1898; total cases filed during the term 240, felonies affirmed, 72; felonies reversed, 40; dismissed, 3; misdemeanors affirmed, 31; reversed, 17; dismissed, 4; habeas corpus affirmed, 2; reversed, 6; dismissed, 4; total, 12; scire facias affirmed, 5; transferred cases to Tyler, 56. Out of 180 cases acted upon, there were only 63 reversals. Now in connection with these figures consider that only such cases are appealed as in the judgment of the defendant attorneys have been erroneously decided; that in the great majority of convictions the penalty is suffered without appeal, and some correct idea can be formed of the care with which our appellate court considers cases brought before it. It is to be presumed that when a case is appealed, the attorney representing the defendant honestly believes error has been committed, at least a disputed question of law is involved in the case, yet we find that only 63 out of 180 of these contentions have been decided in favor of the defendant. I believe that our courts are censured unjustly and that such censure is occasioned in most instances by inadequate investigation of the true facts. In some instances it is caused by total ignorance of the law and of the facts; in others the opinion is heavily alloyed with malice and demagogy. Lawyers with much practice have often had occasion to witness a change of heart and sentiment concerning the matters under discussion. We have often heard prominent men bitterly complain of what they term tardiness and delay on the part of the courts. We have heard them forcibly censure the Court of Criminal Appeals for

reversals, and later we have seen these same men when they, either correctly or unfortunately, have been charged with a violation of the law, or when some relative or friend is placed in that unfortunate condition, suddenly change their views and earnestly and conscientiously when they were not ready for trial insist upon a continuance, and think it extremely harsh and unjust if it should be denied them. If convicted and errors in their judgment were committed and the case appealed we have heard them complain about the carelessness of the Court of Criminal Appeals in affirming such convictions. I take it, that if it were possible for those who criticise the courts to place themselves in the position of parties accused of crime they would change their views and then realize that the courts if anything are not particular enough in enforcing rules of law and that they frequently overrule motions for continuances unjustly.

IN THE KNOWN CERTAINTY OF THE LAW IS THE SAFETY OF ALL.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. W. A. KINCAID,

OF THE GALVESTON BAR.

Mr. President and Gentlemen of the Texas Bar Association:

It is not my purpose to undertake to do anything more in the broad field suggested by the above excerpt from an utterance of Sir Edward Coke than to deal briefly with a few uncertainties that have crept into the administration of our system, and for the correction of which there appears to be now no remedy, except by an appeal to either the constitution or the law making powers. I believe I am justified in saying that there is as much unsafety and quite as much danger in uncertainty in the administration and enforcement of a right, as there is in uncertainty as to the law creating the right or out of which the right may grow.

First.—*Constitutional Uncertainty.*—We are living now under an important law which is at one and the same time both constitutional and unconstitutional. Its constitutionality or unconstitutionality depends entirely upon the court in which it may be called in question. This is an anomaly that has perhaps never before occurred in the annals of the law. In Leach vs. State, 36 S. W. Rep., 471, Ex parte Knox; 49 S. W. Rep., 670, and in some later cases, the Court of Criminal Appeals after elaborate argument and thorough research held, that the statute conferring the criminal jurisdiction of justices of the peace upon mayors and recorders of incorporated towns and

cities was unconstitutional, and Lizzie Knox, who was held under a conviction for a statutory misdemeanor in the recorder's court of the city of Galveston was released from the custody of the sheriff, because in the opinion of the court, the judgment of conviction entered by the recorder was a nullity on account of the unconstitutionality of the law attempting to confer such criminal jurisdiction.

In Harris County vs. Stewart, 41 S. W. Rep., 650, and in May vs. Finley, 43 S. W. Rep., 258, the suit by Stewart, who was county attorney, being among other things brought against the county of Harris for the recovery of his fees in misdemeanor cases, the convicts having worked out their time upon the county poor farm or perhaps under contracts of hiring, and May vs. Finley being brought in the Supreme Court against the comptroller of this State for a mandamus to compel him to issue to the county attorney of Galveston county his warrant for certain fees due him for representing the State before the recorder of the city of Galveston sitting as a magistrate to examine felony cases. Thus it will be seen that the issue of the constitutionality of this law was as sharply and directly presented to the Supreme Court in both of these cases as it had been to the Court of Criminal Appeals in the Lizzie Knox case, and in both cases the Supreme Court held the law to be constitutional, and that the mayors and recorders of incorporated towns and cities have the criminal jurisdiction of justices of the peace. In May vs. Finley, the Supreme Court, speaking by Judge Gaines, says: "If we should yield to the decision of the Court of Criminal Appeals upon the question of the criminal jurisdiction of the mayor or recorder, by the same rule they should yield to the decision of this court upon the question of civil jurisdiction; and yet, if the law be in conflict with the constitution as to the one jurisdiction, it is necessarily so as to the other. If the legislature could not confer the criminal jurisdiction, it could not confer the civil; and neither court could, upon any just grounds, hold that the statute was good in part and void in part. It is valid or invalid as a whole."

"It results that there is no way out of the difficulty; there is no middle ground." This would seem to indicate that the court is of the opinion that mayors and recorders have the civil as well as the criminal jurisdiction of justices of the peace, and there is no doubt but that the legislature has attempted to confer such civil jurisdiction. Given the case in which a citizen is tried and convicted of a statutory misdemeanor before a mayor or recorder, he applies to the Court of Criminal Appeals for a

writ of habeas corpus, and upon a hearing he is discharged and the judgment avoided in so far as it affects his person; that is to say, he could release himself from all imprisonment thereunder by application to the Court of Criminal Appeals; but *ad interim* his land has been sold under an execution issued upon the judgment for the fine and costs adjudged against him. He brings suit against the purchaser to recover his land, but the Supreme Court holds that the judgment was valid in toto, and that the sale and conveyance by the sheriff under the execution issued upon the judgment conveys a good and perfect title to the land. So that the question of the validity of the judgment does not depend upon what the law is, but upon the court in which it is drawn in question, and all this in the same State, and in the two courts of last resort in both instances.

Given two cases in which citizens have been convicted of misdemeanor before a mayor or recorder, one applies to the Court of Criminal Appeals for a writ of habeas corpus, and the other to the Supreme Court for a writ of habeas corpus. The cases are identical in their facts, and the judgments drawn in question have been rendered by the same court. The only question which can possibly be raised is the constitutionality of the law under which each was tried and convicted. The Court of Criminal Appeals enlarges the man who appealed to it and sets him at liberty; while the Supreme Court remands its applicant to the custody of the sheriff and he is compelled to pay the fine and costs or else serve out the term of imprisonment. *Query:* Suppose the defeated applicant should conclude to appeal from the judgment of the Supreme Court remanding him to the custody of the sheriff by an application for a writ of habeas corpus to the Court of Criminal Appeals, what would be the result and what would be the effect of the judgment of the Supreme Court in his case? It is elementary that the judgment of a court based upon an unconstitutional law is a nullity and is subject to an attack collaterally or otherwise wherever it may be met with, and whenever it is attempted to be set up as the basis of a right. Does it not follow that we would be met with the spectacle of the Court of Criminal Appeals annulling and setting at naught the judgment of the highest court in the State and that the Supreme Court would be helpless to enforce its judgment except in the indirect way of subjecting the defendant's property to an execution for the satisfaction of the judgment?

Second.—*Conflicting Decisions by the Different Courts of*

Civil Appeals, in which there is no authority to reconcile the decisions of such courts:

One court of civil appeals has held that a defendant in a case on appeal to the county court from the justice's court may plead a failure of consideration in the county court though it was not pleaded in the justice's court; and another, that a defendant may plead any new matter on an appeal from the justice's court to the county court not pleaded in the justice's court, except counter claims and setoffs. Another court of civil appeals has held that although the defendant permitted judgment to go by default in the justice's court he could answer in the county court on appeal, and the scope of the decision indicates that it is the opinion of the court that notwithstanding such default in the justice's court, he may plead in the county court any matter except that of counter claims and setoffs. One of the courts of civil appeals has held that the defendant on appeal to the county court from the justice's court may plead a payment not pleaded in the court below. Another of said courts has held in a case appealed from the justice's court to the county court, and there twice tried upon pleadings filed in the county court, that the defendant could not upon the trial in the county court, plead anything because of his failure to plead at all in the justice's court and that his answer in the county court was properly stricken out for failure to plead in the justice's court. The same court of civil appeals held in another case on appeal from the justice's court to the county court in which there was a plea in reconvention in the justice's court but no plea of failure of consideration, and in which after the appeal to the county court the defendant filed a verified plea of failure of consideration, that the plea of failure of consideration was properly stricken out for the failure to plead it in the justice's court. Another court of civil appeals has held that in an appeal from the justice's court to the county court, the defendant having failed to plead the statute of limitations in the justice's court could not plead it in the county court. Another that the defendant having failed to plead in the justice's court could at least plead a general denial in the county court on appeal. Two courts of civil appeals have held that where the "long horned" of a citizen had been crossed with a railroad engine the citizen could recover as damages for the Durham resulting from the cross, interest upon the value of the animal from the time it was killed or injured. Another of the courts of civil appeals has held that the querulous plaintiff must be satisfied with the value of the Durham resulting from the cross without the addition of any interest. One

court of civil appeals has held that a railroad company which provided substantial gates in the fence enclosing its rights of way for the convenience of the land owner is not liable for the killing of the latter's stock, the gates having been left open by a third person. One court of civil appeals has held that where crossing is left in a railroad's fence at the request of an abutting land owner, he cannot recover for killing of his stock on the track at such crossing without a showing of negligence other than a failure to fence; *i. e.* that a mere failure to erect gates in such a case is not negligence as to such abutting land owner. Another of our courts of civil appeals has held just to the contrary. Two of the courts of civil appeals have held that such parts of a railroad company's right of way as it has set apart and appropriated to station grounds and switches need not, *as a matter of law*, be fenced, and that as to stock killed in such limits the railroad is not liable except on a showing of negligence in some other particular than a failure to fence. Another court has held that *it is a question for the jury* to determine whether to fence at the particular place in the station grounds or switch limits where the animal was killed, would interfere with the necessity or convenience "of the public,"—not the railroad. One court has held that a railroad is not liable for stock killed that came on its track through gates left in its fence for the convenience of an abutting land owner, although they belonged to some third party, unless negligence in the operation of the train was shown. Another court while not expressly holding to the contrary has clearly intimated it would do so, but avoided an express ruling by saying the case before it did not come within the rule. These are only a few instances which have come under my observation of the differences between the courts of civil appeals in a class of cases in which there is no way of reconciling their conflicting decisions, either by appeal to the Supreme Court or by compulsory certification of the questions to the Supreme Court by the courts of civil appeals. The questions dealt with by justices of the peace, mayors and recorders courts come nearer to the great mass of the people than any other, and yet, notwithstanding their general interest to the whole people and to the poor especially, and the further fact that while the individual case usually presents of itself an insignificant subject matter, yet taken together they are of vast interest to the people; lawmakers as well as lawyers are prone to give them too little attention and it results from the decisions above referred to that a trunk line of railroad is subjected to one character of liability in one

supreme judicial district, and to another character of liability in another district, and the law as administered to its affairs and to the citizens who litigate with it, is in many respects, in these individually insignificant, but collectively highly important matters, as different as though the boundaries of the district marked the boundary lines of sovereign and independent states. It is furthermore a discrimination against the poor, because if the cattle of a man of wealth or of extensive acquaintance are killed by a trunk line in one district under such circumstances as that he could not recover for it under the holding of the court of that particular district, he has but to send his claim to some lawyer of his acquaintance in an adjoining district and he will there recover, because in the nature of things the neighboring court cannot exercise international comity and administer the law of the place where the transaction occurred as a court sitting in another State would do, but it will assume and must assume that the law in a neighboring district is the same as in its own district, and give the plaintiff judgment for the value of his cattle. But it is not so with the poor and obscure; they must necessarily abide by the law as administered by the courts of their own vicinity. Another result of these conflicts is that when these small cases are appealed to the various courts of civil appeals they may and perhaps will be sent by the Supreme Court to other courts of civil appeals than those to which they are directly appealable for decision, and the result is that no lawyer can advise his client with safety when to sue and when not to sue in this large number of cases for however sure he may feel of what the decision of his own court will be upon an appeal of the case, he cannot possibly know in advance what court of civil appeals will ultimately decide his case, so that he is in the attitude of being compelled to say to his client,—the law as administered in this district is thus, and if you bring this suit you will win in the local court, and if it is appealed you will win it on appeal provided the Supreme Court does not send it to our neighboring district for decision, in which event you will lose it. His duty is quite as perplexing as that of the great New York lawyer who is credited with saying to a prominent client: "I can tell you what the law is, but I cannot tell you what those people in Albany (meaning the Court of Appeals of the State of New York) will decide tomorrow." It is placing the decisions of questions of law upon practically the same plane as verdicts of juries upon the facts, and the enunciation of the law in this class of cases as well as in the class first cited no longer depends upon precedent but rests wholly upon the personnel of

the judges who may ultimately decide it. The natural bent, idiocyncracies and prejudices of the human mind in and of themselves create far too much inherent and irremediable uncertainty in the administration of the law and in the personnel of the judges who administer it, and it ought not to be permitted to be rendered still further uncertain by those things which are so easy of correction. The whole State was set agog at a time within the memory of the writer by a case in which a citizen stood before the Court of Criminal Appeals on appeal from a conviction of felony for the theft of a cow, and pending that appeal the rights of property to the cow were tried in the court below by another jury, which decided that the very defendant that had been convicted for theft of the cow was in fact the owner of the cow. This rare occurrence was easily and readily attributed to the known uncertainty of the verdicts of juries upon the facts, but the spectacle was no more absurd than that which is presented to us by our present system as it is now administered in a large class of cases.

It is not my purpose in this article to state what I conceive to be the right of these controversies or to disparage in any manner any of our able and competent judges, because I do not in truth believe that these uncertainties in the administration of the law grow out of any want of learning or ability upon the part of our judges, but out of certain inherent weaknesses in our system. It is absolutely certain that the wisest and best of men do and will always, perhaps, entertain conflicting views, and the dividing line between truth and error in the last analysis of a legal question is entirely too shadowy and too vague to be left to the sporadic decisions of independent tribunals however wise and just they may be, and the first line of cases further manifest the interdependence of the civil and criminal law and indicate the impossibility of devising or even divining a system for keeping them absolutely separate, distinct and independent tribunals. They will at times merge into a conflict with each other in spite of all the foresight which human wisdom can exercise.

The Remedy, it appears to me, is in the establishment of one supreme tribunal for the purpose of reconciling all conflicts and keeping harmonious and uniform not only the law itself but its administration by the courts as well, not because one court or one judge is necessarily wiser or better than another, but because it is better and of greater interest to the people at large that the law be certain and uniform in its operation, than that it be rightly enunciated. As long as time lasts, perhaps, people will differ and have controversies and the power must be lodged some-

where to ultimately decide and reconcile their differences. This is the only way to prevent anarchy and nothing in my opinion tends more to breed anarchy than uncertainty in the law. It furthermore destroys that reverence and awe which the citizen should always feel and yield to the law and its administration by the courts. In order to reconcile the conflict between the Court of Criminal Appeals and the Supreme Court, a constitutional amendment would likely be necessary, giving to the Supreme Court the power to issue writs of error to the Court of Criminal Appeals on constitutional questions. In the second class of cases an act of the legislature could confer upon the Supreme Court authority by writ of error to reconcile the conflicting decisions of the courts of civil appeals, or it could direct and require the judges of the courts of civil appeals to certify a question to the Supreme Court for decision whenever their view was in conflict with that of another court of civil appeals upon the same question. Under the law as it now stands, and under the decisions of the Supreme Court, that court cannot issue a writ of error to the courts of civil appeals in by far the largest number of cases of which justice's courts have jurisdiction and of which the county courts might take original jurisdiction, and it will be observed that in this article I have left wholly untouched the question of conflict between them in cases over which the county courts have original jurisdiction, but I believe it quite likely that many conflicting decisions can be found in that line of cases also. For instance: One court has held that on the general principle that a party injured must use all reasonable means to prevent the enhancement of damage,—that an intending passenger being advised in advance that his ticket was irregular and would not be honored, cannot recover for damages resulting from an ejection from the train on which he sought passage on such ticket despite such notice. Another has held that the principle referred to does not apply and that the passenger may stand on his contract of carriage although verbal and in contravention of the terms of his ticket and recover for an ejection.

In the limited time at my disposal, and on account of the brevity of the notice that I would be expected to prepare an article for this occasion, I have not attempted to cite cases or to analyze them, and it is not pretended that this discussion is thorough or in all respects entirely accurate, my purpose being simply to call the attention of my legal brethren to these subjects for their consideration in order that they might, if they saw fit to do so, bring it to the attention of their various repre-

sentatives, and with the hope that I may have given some food for thought and have suggested something that may ultimately result in good to the people, and to my brethren of the bar, I respectfully submit the subject for their consideration.

A REVIEW OF RECENT NOTEWORTHY DECISIONS OF THE HIGHER COURTS OF TEXAS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. B. R. WEBB,

OF THE FORT WORTH BAR.

Mr. President and Gentlemen of the Texas Bar Association:

The extraordinary growth of our jurisprudence is well illustrated by the fact that in the discharge of the duty assigned me, of reviewing the recent noteworthy decisions of the higher courts of Texas, I shall be able, within any reasonable time, to briefly notice only a tithe of the cases—more than 1000 in total number since the last session of this body—which present features of special interest and importance. Not only is human thought constantly extending and its conceptions of right and justice becoming broader, but, in the present rapid advance of civilization the subject matter with which the applied law must deal is growing and new complications arising in a steadily increasing ratio, and it may be safely asserted that in all the annals of jurisprudence no instance can be found where during the period of a single year a more satisfactory progress has been made in the judicial development and application of the law in any country than has been witnessed here in our Texas commonwealth. One reason for this perhaps is that the arrangement of our present judiciary system is in itself well calculated to produce such result by reason of the incentives and stimulus it affords to the most thorough judicial investigation and the most careful application of the principles of law. We

have five courts of civil appeals that are necessarily and measureably brought into a species of competition with each other, such as that no one of them in justice to itself, can afford to treat any question coming before it carelessly or imperfectly, for even before the ink is dry upon its published opinion another of the courts may have rendered a decision on that same question, treating the subject more thoroughly and correctly; and, aside from this its imperfections and errors, if any, are liable to public demonstration by an adverse decision of the Supreme Court upon writ of error. And as the Supreme Court does not now, as formerly, deal merely with the nisi prius courts, but with appellate tribunals whose written opinions are published, and will ultimately prevail in the forum of public opinion, where based on the better reason, it behooves the Supreme Court now, as never before, to be sure it is right before it goes ahead on a contrary course. Certainly it is not to be wondered at, with so many courts and so many cases determined, that there should have gone abroad an erroneous impression that an unusual extent of conflict of opinion exists between these several intermediate courts; and yet the fact of the matter is that out of about 10,000 cases decided by them, those in which a conflict of opinion has afforded ground to the Supreme Court for granting a writ of error can almost be numbered on the fingers of one hand. As men and courts invariably differ more or less in their opinions and conclusions, and as it ought not to be otherwise, it follows that the existence of occasional differences between the several courts of civil appeals cannot constitute a serious objection to an appellate judiciary having at its head a court specially organized for the speedy determination of such differences and the adjustment of matters of conflict.

CONSTITUTIONAL LAW.—VALIDITY OF COUNTY BONDS.

Mitchell Co. vs. Citizens Nat. Bank of Paducah, 91 Texas, 370 (43 S. W. Rep., 880), opinion by Justice Brown, is a case of far-reaching importance in its decision that bonds issued by counties for authorized purposes cannot be invalidated by reason of a failure of the commissioners court issuing them to levy the requisite tax for their payment, since that duty is ministerial in its nature. Sec. 7, art. 11, of the constitution provides that, "No debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax

to pay the interest thereon and provide at least two per cent as a sinking fund." Mitchell county issued certain courthouse bonds without levying such tax at the time of their issue or at any time thereafter, and certainly a literal construction of the above provision would have warranted the court in holding the bonds invalid,—with the result of defeating the payment of obligations issued and accepted in good faith, and for which the county had received a lawful and sufficient consideration,—a result that would have worked injustice to the plaintiff in that case, and a yet larger measure of injury to the credit of Texas. Instead of a literal construction, however, the court, taking a broader view of the matter, gave a more liberal one, the reasoning in favor of which is unanswerable. The tax rolls of the county showed an amount of taxable property sufficient to have warranted the levy of the requisite tax within the constitutional limits. The determination of the rate of the tax and its levy are declared to be ministerial acts, the performance of which is plainly directed by the statute which provides that when county bonds are issued for such purpose, "the commissioners court shall levy an annual tax sufficient to pay the interest and create a sinking fund for the redemption of such bonds, not to exceed one-half of one per cent for any one year." The terms of the statute and the nature of the duty it imposes, says the court, are such that when the bonds have been issued under circumstances authorizing their issuance, the bondholder may resort to a court and by mandamus compel the county to levy the tax for their payment, and hence a failure of the county to make such levy will not render the bonds void. On this, the main point in the case, the opinion of the Supreme Court is in accord with that of the Court of Civil Appeals as rendered by Chief Justice Tarlton, 39 S. W. Rep., 638. The case also involved a further question as to the validity of certain bridge bonds that were issued with the intention that their proceeds should be used in building the court house; and this purpose of unlawful diversion was disclosed on the face of the order of the court providing for their issuance, but not on the face of the bonds themselves. The Court of Civil Appeals held that a purchaser of the bonds without actual notice of such unlawful purpose was an innocent purchaser; but the Supreme Court held that he was chargeable with constructive notice by the recitals in the order providing for the issuance of the bonds.

Presidio County vs. Bank of Paducah, 44 S. W. Rep., 1069, opinion by Justice Fly, involved the same character of subject matter as in the Mitchell county case against that bank, and its

decision, which is in line with that case, also maintains the validity of the county bonds involved against yet other objections, growing out of an illegal removal of the county seat, by an application of the doctrine of estoppel against the county. A writ of error in this case was denied by the Supreme Court.

SAME.—JURISDICTION OF MUNICIPAL COURTS.

The cases of Leach vs. State, 36 Texas Crim. App., 248, opinion by Judge Davidson, and Coombs, *alias* Maud Shirley, vs. State, 44 S. W. Rep., 854, opinion by Judges Davidson and Henderson (with Presiding Judge Hurt dissenting) on the one side, and those of Harris County vs. Stewart, 91 Texas, 136, opinion by Justice Brown, and May vs. Finley, 91 Texas, 354, opinion by Chief Justice Gaines, on the other side, present what is in several respects the most serious question of constitutional construction that has arisen in Texas, and also a conflict of opinion between our two courts of last resort that is irreconcilable and for which the constitution has prescribed no method of adjustment; —while the decisions in the first two of the cases have already practically had the effect of virtually striking down the administration of the criminal laws of the State by the municipal courts. In perhaps all of the larger cities of the State that are acting under special charters, the legislature has conferred upon the municipal court jurisdiction to enforce the general criminal laws of the State; and it was supposed that it had the power to do this under sec. 1, art. 5, of the amended judiciary article of the constitution, adopted in 1891, which provides that, "The legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."

In the Leach and Coombs cases the Court of Criminal Appeals squarely denies that the legislature is empowered by the above provision to confer the jurisdiction of the constitutional courts, those designated and defined in the constitution, upon municipal courts, either as original or concurrent jurisdiction, and that its attempt to do so is null and void. The opinions in these cases by Judges Davidson and Henderson, presenting this view of the matter, are able and exhaustive, and will for many years to come be read with interest and profit by every one engaged in the study and investigation of constitutional law. The entire judiciary article of the constitution is brought under review, its history and the changes made in it by the different

constitutions, together with the decisions thereunder, are all carefully considered, and the conclusion is reached, that while the legislature may create other courts, such as municipal courts, and confer upon them jurisdiction in strictly municipal matters, yet such courts are no part of "the judicial power of the State," and cannot be invested with jurisdiction of offenses under the State law, assigned by the constitution to the other courts.

The Supreme Court, however, does not concur in this construction, but, in the cases by it last cited, holds that municipal courts may be invested by the legislature with jurisdiction which the constitution has assigned to the other courts. The language of section 1, cited above, independently considered and under its plainest and most direct meaning, undoubtedly warrants this construction; and it is only by a somewhat complex reasoning and a consideration of matters and features outside of this section that the opposing conclusion is reached; and this construction, while being more in conformity with the exact language of this amended section 1, tends also to uphold and preserve what the people, acting through their legislatures, have done thereunder. As neither of the courts has jurisdiction over the other, and as no method has been provided for determining a conflict between them, it is clear that the solution of the difficulty here can be reached and removed only by another constitutional amendment which shall either make the power of the legislature to alter the jurisdiction of the courts as specified in the constitution so plain that it cannot be questioned, or shall provide a method for the final solution of all questions upon which the two courts may differ.

This conflict of opinion is already bringing up grave entanglements which threaten to increase in number and gravity until it is adjusted and removed. In Fort Worth quite recently the muncipal court refused to permit the county attorney to prosecute offenders under the State law therein, and he applied to the Court of Civil Appeals for a mandamus to compel a recognition of his right to so prosecute State cases; and that court, upon the ground that it was a part of the civil judicial system, and its judgments subject to that of the Supreme Court upon writ of error, granted the mandamus (Jackson vs. Swayne, 45 S. W. Rep., 619); but as a violation of the writ of mandamus would be a contempt penal in its nature, and a case wherein a habeas corpus would lie, it will be in the power of the Court of Criminal Appeals, as remarked by Justice Hunter, to discharge the municipal officer from imprisonment for contempt in disobeying the mandamus, directing them to do what it has declared would

be illegal action on their part. So, in the case of May vs. Finley, Comptroller, above, the county attorney of Galveston county presented his bill against the State for fees in the recorder's court in the city of Galveston, sitting as an examining court in the prosecution of offenses under the State law and the comptroller declined to pay, for the reason that the Court of Criminal Appeals had decided that such proceedings in a municipal court are mere nullities. The Supreme Court, however, holding the contrary view, granted the writ and thus directed the payment of his bill. But while the county attorneys may thus by mandamus enforce their rights to prosecute and collect their fees, who shall be able to deliver the mayors, the recorders and city judges from condemnation by the other court when the offenders whom they may send to jail shall prosecute them in the criminal courts for false imprisonment? The municipal judges see upon the one hand a fine for contempt in disobeying the mandamus, and on the other a conviction for false imprisonment,—a most unenviable position, somewhat like that of the man who was between the devil and the deep sea. This unfortunate condition of affairs in the administration of justice most pertinently suggests the necessity of some further constitutional provisions by which a conflict of two courts of last resort can be adjusted without the necessity of resorting to an amendment of the constitution upon each matter of difference; and to this matter the attention of our next legislature is respectfully invited.

The Coombs case decides the further proposition that the legislature can not delegate authority to a municipal corporation to suspend a State law by licensing and thus rendering lawful an act which the general statutes make a crime. Section 20, art. 1, of the constitutions prior to the present one, provided that "no power of suspending the laws of this State shall be exercised except by the legislature or its authority"; but the words "or its authority" were omitted from the corresponding provision of the present constitution (sec. 28, art. 1); and in Burton vs. Dupree, 46 S. W. Rep., 272, opinion by Justice Key, the ruling in the Coombs case on this point is cited and followed; and it is there held that a contract leasing a building in the city of Waco to be used as a house of prostitution is illegal and void, although it was a licensed house, and the city charter of Waco authorized its city council "to license and locate all houses of prostitution."

SAME—APPEAL BOND.

H. & T. C. Ry. vs. Red Cross Stock Farm, 91 Texas, 639 (45 S. W. Rep., 375), opinion by Justice Brown, may be said to in-

volve a matter of constitutional construction. Section 19, art. 5 of the constitution declares that "appeals from the county court shall be allowed in all cases decided in justice court when the judgment is for more than $20, under such regulations as may be prescribed by law." The constitution does not itself make any requirement of an appeal bond, but, as one of the regulations that may be required by law, the legislature has made the giving of such bond essential, and has required (Rev. Stats., art. 1670) that the appellant shall execute a bond in double the amount of the judgment. A question first arose as to what kind of a bond should be given where judgment of the justice court was wholly against the plaintiff, and it was claimed that in such case it should be in double the amount of the costs adjudged against him; but in Yarborough v. Collins, 91 Texas, 307 (42 S. W. Rep., 1062), where one of the parties appealed and gave a bond in just double the amount of the judgment proper, and not double the amount of the judgment and costs, the Supreme Court held that the costs were no part of the amount of the judgment; and in this case of Railway vs. Red Cross Stock Farm, upon certified question, it was further held, as a logical sequence, that if there was no judgment in the case other than one of dismissal and for costs, the judgment proper had no amount whatever, and presented a case not provided for by the statute; and since the constitution gave the right of appeal generally, without the requirement of bond, and the legislature had failed to make any requirement of bond applicable to this character of case the plaintiff had the right to appeal without giving any bond at all.

SAME—CONCLUSIVENESS OF FINDINGS OF FACT BY THE COURT OF CIVIL APPEALS.

An interesting constitutional question, and one that has occupied a considerable measure of attention on the part of our courts, is the proper construction of that provision of the amended judiciary article of the constitution (sec. 5 of art. 6) which provides that "The decision of the said courts (of civil appeals) shall be conclusive upon all questions of fact brought before them upon appeal or writ of error," thus limiting the jurisdiction of the Supreme Court to questions of law. In S. A. & A. P. Ry. vs. Choate, 43 S. W. Rep., 537, opinion by Justice Fly, of the Court of Civil Appeals, and same case, 44 S. W. Rep., 69; opinion by Chief Justice Gaines, of the Supreme Court, there is presented a very marked difference of opinion between the two courts as to whether the matter there at issue between them is a question of law or a question of fact. Sub-

stantially the same question, with opposing opinions and reasoning, may be found in the case of T. & P. Ry. vs. Johnson, 14 Texas Civ. App., 556 (37 S. W. Rep., 973), opinion by Justice Stephens, and Ins. Co. vs. Hayward, 88 Texas, 315, opinion by Special Chief Justice Hume. The question involved is substantially this: Is the finding of the Court of Civil Appeals to the effect that the evidence was not sufficient to have authorized a verdict in plaintiff's favor, or not sufficient as to any given issue to have authorized a charge of court thereon by the trial court, such a finding of fact as concludes the Supreme Court from reviewing that matter? In Land Co. vs. McClelland, 86 Texas, 189, decided about one year after the courts of civil appeals went into operation, the idea is presented that the findings of the courts of civil appeals are conclusive only where there was a conflict in the evidence; and in Sebastian vs. Cheney, 86 Texas, 497, the judgment of the Court of Civil Appeals and that of the district court were reversed because, in the opinion of the Supreme Court, the evidence was not sufficient upon an essential point to authorize a verdict and judgment in favor of plaintiff, but there was no specific discussion of this point of difference, the judgment of the Supreme Court merely proceeding on the theory that it had jurisdiction to determine such a question, there involved, as one of law and not of fact.

In Warren vs. City of Denison, 89 Texas, 557 (36 S. W. Rep., 404), a case where the court of civil appeals had held that the evidence failed to show such negligence on the part of the defendant city as warranted a verdict for plaintiff, the Supreme Court held that it was conclusively bound by the holding, and dismissed the application for writ of error for want of jurisdiction. The opinion affirmed, however, that whether or not there was any evidence tending to show the city was negligent was a matter of law; but it sets out the evidence in that case to show that it was a case of conflicting evidence as to which the finding of the court of civil appeals was properly to be held a finding of fact.

In Ins. Co. v. Hayward, above cited, there was a special Supreme Court, composed of Justices Alexander and Ramsey and Chief Justice Hume. The court of civil appeals had reversed the judgment of the district court on the ground that the evidence did not warrant a verdict in favor of plaintiff, as it showed that the insured had committed suicide contrary to the stipulations of the policy; and it was held by a majority of the court that this involved a finding of fact by the court of civil appeals that was conclusive, and hence, that the Supreme Court

was without jurisdiction to have granted the writ of error. The dissenting opinion of Chief Justice Hume presents the first argumentative discussion of the question as arising under our amended judiciary article, giving a review of the cases bearing upon it, and pointing out a number of cases decided under the old judiciary system, with reference to elementary authorities, wherein such a question was spoken of and considered as involving a question of law for the judge and not of fact for the jury; also adverting to the case of Sebastian v. Cheney, above, where, under the new system, the Supreme Court had evidently proceeded on the theory that it was a question of law only. In such a case, Judge Hume declared, after defining the question: "The decision is, in effect, that the evidence is deficient in probative force to support the verdict. It is not less a conclusion of law than would be the judgment of a court sustaining a demurrer to evidence; and the issue presented to this court by the impeachment of the decision is one of law."

The presentation of the other side of the question by Justices Stephens and Fly in the respective cases just cited, is also a very strong and forcible one, having a considerable degree of that "probative force" spoken of by Judge Hume. "Where the judge determines," says Justice Stephens, "that the evidence does or does not raise a given issue, * * * he declares a question of fact * * * which is determined by an examination of the evidence produced, and not by his knowledge of the law. How can that become a question of law which is determinable by an examination of or a search for facts? Whether there is evidence at all, or how much, though not the same questions, are nevertheless questions of the same nature, and the same method of investigation that determines the one will determine the other. Whether a bushel of chaff contains a single grain of wheat, or many grains or none, is ascertained in the same way. So, to ascertain whether a voluminous statement of facts contains any evidence on a given point, or much or none, we have but to read it. It is not determined by consulting the law authorities."

"It is elementary," said Chief Justice Gaines, in Choate vs. Railway, 44 S. W. Rep., 69, "that whether there be any evidence or not to support an issue, is a question of law and not of fact; and it follows that the decision of the Court of Civil Appeals upon such a question is subject to review by this court. Nor do we concur in the opinion that the courts of civil appeals have the right to conclusively determine the facts of any case. Our bill of rights contains the emphatic declaration that 'The

right of trial by jury shall remain inviolate.' * * * It is contrary to the genius of our institutions, as well as to the letter and spirit of every constitution adopted in this State, to suppose that it was ever intended to substitute the judgment of the appellate court upon the facts of a case in place of that of a jury, and to make the determination of these courts final." This was said in a case where the Court of Civil Appeals had reversed the judgment of the trial court on the ground that it was not warranted by the evidence, and with the added direction that the district court should instruct a verdict for defendant, if the evidence should be the same on another trial. The Supreme Court, being of opinion that there was some evidence tending to show negligence (and consequent liability) on the part of the defendant, reversed that part of the judgment which directed the trial court to instruct a verdict for defendant if the evidence was the same on another trial, holding that where there was a conflict of evidence, the Court of Civil Appeals had no power to thus substitute its finding for that of a jury. Justice Fly's opinion in this same case, upon a second appeal, points out that the Supreme Court, in Wallace vs. Oil Co., 40 S. W. Rep., 400, gives as a reason why it did not review the judgment of the Court of Civil Appeals in that case, that it could not review a finding of such court to the effect that there was no evidence to sustain the verdict; and since, in the very case then at bar, the Supreme Court have held that the determination of the Court of Civil Appeals, that the verdict should be set aside, was conclusive, it logically and necessarily followed that it had no jurisdiction to review and reverse the latter part of the judgment, since, if the lower court's reason for reversal was correct, or was to be conclusively held as correct, the other part of the judgment was unquestionably warranted and recognized by long established practice, and could not have been error.

In Joske vs. Irvine, 44 S. W. Rep., 1059, Justice Denman declared, upon a most careful review of the subject and authorities that the right of the court to determine, as a matter of law, that there was no evidence warranting a verdict for the plaintiff, or sustaining a material and essential issue, is not restricted to a determination that there is no evidence whatever, no scintilla of evidence, but extends to a determination of whether, though there be some slight evidence adduced, its probative force is such as to warrant a verdict, a finding or a charge of court, or be only such as to raise a mere surmise or suspicion of the existence of the necessary facts sought to be established. This seems to

be a logical, certainly a not unreasonable, application of the rule, if the rule itself correctly obtains; but this view of the matter serves to emphasize the importance of correctly determining the rule, for it seems possible, even probable, that eventually the conclusive effect of the civil appeals' courts' findings of fact will be dissipated entirely. Manifestly the question is a complicated one, difficult of any clear and unquestionable solution. The law must in every instance arise from facts, or the absence of facts; and since a question of this kind has fact at one end and law at the other, its determination the one way or the other will chiefly depend, perhaps, upon which end is kept most prominently in view. It was a mooted matter with the ancient philosophers, and one which the profoundest modern philosopher has not yet solved, whether, primarily, the egg came from the hen or the hen came from the egg—there being hen at one end and egg at the other, in whatever way the matter can be turned. As the Supreme Court is conclusively invested with the final say as to the conclusiveness of the other courts findings of fact, it is possible, it is even probable, that its view of the matter will continue to prevail, even though the other courts should have upon their side, in the argument and logic of the matter, that weight of preponderance which should be sufficient to turn the scales in their favor. The Supreme Court concedes, for certainly the language of the constitution must mean something, that its declarations as to conclusiveness applies to the findings of facts upon conflicting evidence; but mark you, it rests entirely with the Supreme Court to say, in each and every case, whether there is an entire absence of evidence, or whether there is slight evidence that does not count, as explained in Joske vs. Irvine, or whether it is a case of conflicting evidence, and the line between the slight evidence cases and the cases of conflicting evidence is a shadowy and uncertain one, an adjustable line, capable of being located to suit the convenience of the court. The ultimate outcome of the matter, it may be reasonably prophesied, will be a verification of the Scripture which declares that, "Unto him that hath (the final say) shall be given, and from him that hath it not shall be taken away even that which he thought he had."

SAME—STATE ANTI-TRUST STATUTE.

The case of Waters-Pierce Oil Co. vs. State, 44 S. W. Rep., 936, opinion by Chief Justice Fisher, was an action to enforce a forfeiture of the oil company's right to do business in this State because of its violation of our Texas anti-trust statute.

The magnitude of the questions involved, and the recent fulminations of some of the inferior federal courts, evidently bent upon overriding and destroying that statute, as well as the ability with which its validity is here maintained, all tend to render this case one of special interest. The statute was here again attacked upon the ground that, as class legislation, it is obnoxious to the 14th amendment to the federal constitution, and Judge Fisher's opinion adds much, both in the way of citing additional authorities and in cogent reasoning, to the opinions already rendered by our State appellate courts holding this objection to be untenable. It is further and specially urged in this case, against the statute, that it illegally infringes upon the liberty of the citizen to contract concerning his property, and tends to deprive him of his property without due process of law; and the constitutionality of the statute as a proper exercise of the police authority of the State is ably and fully maintained, with a thorough review of the latest decisions bearing upon this feature of the subject. The case is further noteworthy because of the appellate court having embodied in its opinion the most admirable and explicit charge of the trial judge, Hon. R. E. Brooks, correctly covering every proposition of law and fact before the court, and which charge is held not subject to tenable objection at any point. This case must be regarded as a valuable contribution to the literature and law of a yet unsettled question,—the validity of the Texas anti-trust statute when subjected to the test of the federal constitution by the Federal Supreme Court. Those who have observed the trend of the federal decisions for the past decade cannot well have other than the gravest apprehension as to the final result, for during that period, if not longer, the great corporations and trusts of this country, when driven for shelter to the federal judiciary, have rarely ever failed to derive from it succor and sustaining grace, and to find it a very present help in the hour of need.

SAME—LOCAL ROAD LAW—NOTICE.

An interesting question of constitutional and statutory construction is decided in Smith vs. Grayson Co., 44 S. W. Rep., 921, opinion by Justice Bookhout. This was a suit by Smith against the county to recover fees and commissions due him as county attorney for prosecuting and convicting certain parties who were unable to pay the judgments, and were put by the county commissioners at labor upon the public roads, where they worked out their fines and cost. That county, in maintain-

ing its road system, is operating under the act of March 25, 1891 (pamphlet laws, p. 91); and it claimed exemption from payment of such fees, where the fine and costs were so worked out, by virtue of sec. 7 of that act, which expressly prohibits it from paying fees in such cases.

The plaintiff insisted that this was a local or special law, and was in violation of sec. 56, art. 3 of the constitution, prohibiting the passing of local laws, except for certain purposes therein authorized and enumerated, unless notice of the intention to apply therefor had been published in the locality where the law was to operate, and that this was not a purpose authorized by this section of the constitution. the court held that the law was a local one, but that, under sec. 9, art. 8 of the constitution, which provides that "the legislature may pass local laws for the maintenance of roads and highways without the local notice required for local or special laws," the legislature was authorized to pass the law in question; and, construing the word "maintenance" that it include the power to provide for and keep up a system of public highways; also that sec. 9, art. 8, was not in conflict with sec. 2, art. 11, which provides that the construction and repairing of public roads shall be by general laws, but that the authority conferred by such sec. 9 was only cumulative of that authorized by sec. 2. It is strongly intimated, in passing upon the clause of limitation in sec. 56, art. 3,—that "no local law shall be passed where a general law can be made applicable,"—that it is the sole province of the legislature to determine whether or not a general law can be made applicable. It was held in conclusion that the subject of the act was fairly embraced in its title; that the law was constitutional; and that under sec. 7 thereof the plaintiff was not entitled to recover.

It is believed that this is the first and only time the constitutionality of this law has been passed upon. The decision indicates that the law was vigorously attacked, and every phase of the question is carefully considered in the able opinion of Judge Bookhout, the latest addition to our appellate bench. A writ of error having been denied by the Supreme Court, the decision may now be regarded as authority.

MARRIED WOMAN'S ACKNOWLEDGMENT AT LAW.

The case of Wheelock vs. Cavitt, 91 Texas, 682 (45 S. W. Rep., 769), presents another characteristic decision with respect to the married woman's acknowledgment law—a subject that

an honest lawyer cannot approach except with feelings of sadness and a sense of shame. It is a case which declares, in effect, that the doctrine of innocent purchaser cannot stand against a married woman; and in fact it would seem that nothing can stand against her, or at least that it cannot stand long—not longer than until the higher court can get a pass at the matter. The doctrine of innocent purchaser is justly one of the most favored in all the field of equity jurisprudence, and by quite a line of decision in this and in all the States, it has been held that where the officer's certificate of a married woman's acknowledgment to a deed signed and delivered by her is regular upon its face, she will not be permitted, as against an innocent purchaser of the property, to impeach the certificate by showing that its recitals are incorrect, and that the acknowledgment was not duly taken in the manner required by law. But her liege subjects, the courts of the realm, with unparalleled devotion and ingenuity, have succeeded, by the drawing of subtle distinctions and by overturning the maxim of "False in part, false in whole," in engrafting upon this rule a very notable exception, the one recognized in this case. It is admitted in the decision that if the certificate is false only in part, if part of it is true and the other part a lie, an innocent purchaser is entitled to protection. But if the entire certificate is false, if the woman did not appear before the officer at all, then the rule does not obtain, for the manifest reason, mark you, that the officer in such case had no jurisdiction to lie. The officer cannot tell a lawful and valid lie until his jurisdiction to do so has been duly invoked and attaches; and that is the essence of the decision in this and similar cases; and upon that kind of logic the courts lend their aid to the plaintiff to take from the defendant property that has been sold to him by the wife and paid for long years ago, and this without any return of the purchase money.

Aside from the acknowledgment law, let me say in justice to our courts, the decisions for the past year show some indications of improvement even as to the law of married women. Thus, in Coleman vs. First National Bank of Waxahachie, 43 S. W. Rep., 938, opinion by Justice Bookhout, where the question at issue was whether a husband is authorized to check out moneys belonging to the separate estate of the wife, deposited by her in the bank in her own name, and known by the bank to be her separate estate, it was held that he is authorized to thus reduce the wife's separate estate to his possession, and that the bank could be held responsible only where it was shown that there

was collusion between it and the husband to defraud the wife, or that it had participated in the conversion of her property, or knowingly received benefits from the husband's conversion. It is clear that if our present courts were as strongly committed to her cause as was the court in the time of Berry vs. Donley, they would have found no very serious difficulty in holding, in this case, that the bank held that money for the wife alone, and as the most sacred of all trusts that could be committed to mortal hands.

So, in the City of San Antonio vs. Grandjean, 91 Texas, 435 (41 S. W. Rep., 471), opinion by Chief Justice Gaines, it was held by the Supreme Court, reversing the judgment of the Court of Civil Appeals, that where a married woman's land was taken under condemnation proceedings to which she was not a party, but only her husband, her acceptance with him of the price awarded for the land estopped her from claiming it, and operated to divest her title. How it is that estoppel, from acceptance of the price, in connection with a condemnation proceeding to which she was not a party, will operate to divest her title, when such acceptance will not estop her in connection with a deed to which she is a party and which is her own act, is one of those things which in the unsearchable wisdom of Jehovah, is past finding out; yet it is gratifying to see that the court has gone as far as this case in the right direction. The opinion of the Court of Civil Appeals, rendered by Justice Neill (38 S. W. Rep.), holding that without a legal condemnation to which the wife was a party, or a legal conveyance duly acknowledged by her, her title could not be divested, and that she could not be estopped by her receipt of the price, is apparently more in harmony with the trend of the decisions on this general subject; but the decision of the Supreme Court is hailed with glad acclaim by those of us who have stood so long in the shadow of the common law as it obtained back in the dark ages, looking hopefully for the breaking of a morn upon which the sun of reason will come forth to shine.

MECHANIC'S LIEN ON HOMESTEAD.

Paschal and Wife vs. Pioneer Loan Association, opinion by Justice Rainey, not yet published, involves an interesting determination of contract law in connection with the statutory mechanic's lien on the homestead.

Appellants contracted with the loan company to build for them upon their homestead lot a house of certain dimensions for

$1500, and the written contract therefor was duly executed by them. The company, finding afterward, as I presume, that there was a vendor's lien for some $300 on the lot, used so much of the money to clear that off, and also about $200 more of it in paying up for appellants' interest due on the loan, and assessments due on the shares of stock in the company which they had taken to obtain the loan; and it then erected a house worth about $1000, and which fell materially short of the one contracted for. The diversion of part of the loan, as just stated, seems to have been made with the assent of appellants, and they moved into the house when it was turned over to them, but resisted the enforcement of the lien upon the ground of non-compliance with the contract; and the wife testified that she never consented to the house as completed, and would not have signed a contract for such a house. It was held that the loan company, having failed in the matter of a substantial compliance with the contract, could not recover thereon, but only upon a quantum meruit for the value of the house actually built, and could enforce no lien, as the lien upon the homestead attached only by virtue of the written contract; and that the acquiescence of appellants in the diversion of part of the loan did not so estop them as to prevent the abrogation of the lien.

The moral of this decision is that it is not wise to swap horses in the middle of the stream when dealing with a married woman, or perhaps any one else not sui juris, lest it happen in the last hour that you be shut out, as were the foolish virgins, from going in unto the feast. It may not be amiss for me to say here that I am not prejudiced against the married woman, but am in fact somewhat partial to her, and am in favor of any law giving her a just and reasonable measure of protection, as does this feature of the statute as to mechanic's liens on the homestead. In this case the loan company, of its own volition, and seeking its own profit and advantage, made a material change of the written contract upon which its right to a lien depended,—such a change as amounted in principle and effect to substituting an oral or an implied contract to build a thousand-dollar house, in lieu of the written lien contract,—and the *jus naturale*, as well as the *lex scriptum*, ordains that men must abide the consequences of their acts.

THE TURNTABLE CASES.—INJURY TO TRESPASSING CHILDREN.

The courts in a number of cases, the first and leading ones of which are commonly known as the turntable cases (Railway vs.

Stout, 17 Wall., 65; Evansich vs. Railway, 57 Texas, 123) perhaps unduly influenced by considerations of humanity and the hardships of the individual cases, engrafted upon the well established law an exception imposing a measure of liability upon the owner of property for injuries accidentally occurring to children trespassing thereon somewhat broader than reason or public policy would warrant,—an exception under which the owner of premises having anything thereon attractive to children and dangerous to them, is held responsible for injury resulting therefrom although the children may have come upon the premises without the owner's invitation, knowledge or consent. Soon there arose a large number of cases, each demanding upon grounds similar to those in the first case, an extension of the exception; and in many cases, as in Railway vs. Edwards, 90 Texas, 65, the courts have been hard put to it to prevent the exception from becoming a general and vicious rule. The owner's liability, in the original case, was made to rest upon the fact that a railroad turntable was a thing calculated to attract children, as well as a dangerous thing for them to play with, and hence the duty of the owner to so guard it as to prevent injury to them. But if a turntable is attractive to children, why not also a pond or pool of water, or a haystack, or a tall fruit tree, and the like, and what is there that may not prove attractive to infantile curiosity? and if the attractiveness of the object is solely a question of fact for the jury, is there anything by which a child might be injured, that a corporation could safely have upon unguarded premises? The recent cases afford a number of instances in which the courts have manfully struggled to restrain the exception within something like reasonable limits, and yet maintain a consistent line of decision. One of these is Dobbin vs. M. K. & T. Ry., 40 S. W. Rep., 861, opinion by Justice Finley, and same case in 91 Texas, 60, opinion by Justice Denman,—the two opinions concurring upon the law of that case and the case being one wherein the defendant railway company was held not liable in damages for the death of a child of three years drowned in a pool of water accumulated in a ditch on its right of way.

S. A. & A. P. Ry. vs. Morgan, 45 S. W. Rep., 169, opinion by Justice Pleasants, was a turntable case almost precisely similar in its features to the original one, and in the opinion of the court of civil appeals, holding that the trial court properly overruled a general demurrer to plaintiff's petition, the doctrine of the originable turntable cases is vigorously maintained and the reasoning in support of them reaffirmed. The case was carried

to the Supreme Court, and in the opinion there rendered by Justice Denman (46 S. W. Rep., 28) the petition was held insufficient in failing to allege either an invitation in fact to the child to come upon the premises or that the turntable was unusually attractive. "In so far," says Justice Denman, in a most carefully considered treatment of the subject, "as the turntable cases * * * may be considered to lay down the broad proposition that the owner can be held liable without proof of either an intent to injure or an invitation, as these have been above explained, we do not think them based upon sound principle."

PRACTICE AND PROCEDURE.

Sanders vs. Britton, 45 S. W. Rep., 209, opinion by Justice Collard, presents an interesting point as to the application of money tendered into court *pendente lite*. Plaintiff sued for the value of a mule, and the defense set up was that defendant, formerly owning the mule, had traded it to plaintiff, receiving from plaintiff $17 boot in the trade, but because of alleged fraud of plaintiff in the trade, defendant asked to have it rescinded, which would, of course leave him still owning the mule; and in order to entitle himself to such rescission by putting the parties *in statu quo ante bellum*, he tendered into court the $17 he had received. The jury returned a verdict in plaintiff's favor for the value of the mule, this being, of course, a denial of the rescission asked for by defendant; and the court thereupon rendered judgment for plaintiff for the value of the animal, less the $17, which it then and there, *in propria persona*, proceeded to turn over to the plaintiff in satisfaction of the verdict *pro tanto;* but it is held on appeal that the court had not the right to thus apply the money to a purpose other than that for which it was tendered into court. While this clearly seems to be good law, it is hard to say that the action of the trial court was not reasonably within its equity powers, especially if the defendant was insolvent and execution proof. It seems possible that the trial judge in this case may have been the same gentleman who, while sitting on the woolsack as justice of the peace, was asked to issue a search warrant for a handsaw. He looked in vain through his book of forms for such a warrant for a handsaw, but he did find one for a meat ax; so he copied and issued that, and delivered it to the constable with verbal instructions that if, in searching for the meat ax, the handsaw should happily be found, he might bring that along also.

COMMON LAW—ACTION FOR DEATH.

G. C. & S. F. Ry. v. Beall, 91 Texas, 312 (42 S. W. Rep., 1054), Justice Denman delivering the opinion, decides an interesting point of the common law as it obtains in Texas with reference to actions of damages for the death of a human being. Plaintiff's minor son, while in the employ of the railway company as brakeman, was instantly killed by falling from the cars and being crushed under the wheels. There was some evidence tending to show that he was guilty of contributory negligence; and as, under our statute giving a right of action in cases of death, his contributory negligence could be imputed to the parents, as plaintiffs in this action, they sought to avoid this by a charge, given by the trial court, to the effect that if the deceased was a minor, and this was known to the railway company, and it employed him without the assent of the parents, the questions both of contributory negligence on his part and of negligence on the part of the defendant company in operating its cars, were immaterial, since, in such case, the wrong consisted in the unauthorized employment of the minor,—this charge proceeding upon the theory that plaintiff had a right of action independent of the statute. The question here involved was certified to the Supreme Court, and after a most careful examination, it was decided that under our statutory adoption of the common law, and under the decisions of the common law courts of England, followed by the courts of other States of this country, no right of civil action existed under the common law system for the death of a human being, although the right of the master or parent to recover for loss of services of the servant or child, by injury falling short of death, is fully recognized. In thus denying a right of recovery for a loss of services in whole, while it is allowed for a loss in part only, the common law rule is illogical and inconsistent; and in the decision first declaring such rule (Baker vs. Bolton, 1 Camp., 493) the reason for it is not given. Nevertheless, as that decision has been followed, and as no case could be found to the contrary, it was perhaps properly declared that the rule must be considered as established, and that its change is a matter for legislative rather than judicial action. But how it is that the courts can have the power to make and establish a rule of law, and yet be without the power to revoke and discharge it when it is found to be wrong, is one of those things we lawyers have never been able to satisfactorily explain to the lay mind, and to the common sense of people uninitiated in the subtler mysteries of jurisprudence.

INTERSTATE COMMERCE.

The case of G. H. & S. A. Ry. v. Armstrong presents some interesting features of decided law as to what is an interstate shipment, and also as to the validity and application thereto of our State statute of March 4, 1891, forbidding contract limitations of the time in which the shipper must give notice of damage and bring suit therefor, to less than two years. Armstrong shipped some cattle on the G. H. & S. A. road, and on a through bill of lading, from Spofford Junction, Texas, to the Indian Territory, via LaGrange, Texas, which was the end of the initial carrier's line. The contract of shipment exempted the railway company from liability beyond its own line, and also from liability for damages unless suit should be filed therefor within forty days; and as plaintiff's action was not filed within such time, the defendants pleaded that stipulation, and plaintiff demurred thereto, setting up the Act of 1891 as invalidating the contract limitation of time. The district court overruled the demurrer and directed a verdict for the defendant, on the ground, it would seem, that this was an interstate shipment and the State statute could not apply to it. Armstrong appealed, and in the Court of Civil Appeals (29 S. W. Rep., 1117) the judgment was reversed; Justice Fly, who rendered the opinion, putting the reversal upon the ground that the statute above cited did not unduly interfere with the regulation of interstate commerce. So the case went back and was again tried, and the plaintiff having obtained judgment this time, the defendant road appealed. Upon the second appeal (43 S. W. Rep., 614) it is said in the opinion by the Court of Civil Appeals that the trial court had put its judgment sustaining plaintiff's demurrers to defendant's answer setting up the forty days stipulation, upon the ground that the shipment was not, as to the defendant road, an interstate one, but a domestic one, from Spofford Junction to LaGrange, inasmuch as the limitation of defendant's liability to its own line rendered the contract as to the remainder of the distance a mere agreement to protect the shipper in the through rate of freight; and it also declared that under the authority of the then recent rulings of our Supreme Court in Direct Navigation Co. vs. Ins. Co., 89 Texas, 1 (32 S. W. Rep., 889), the judgment must again be reversed and the cause remanded,—which was accordingly done. Upon the jurisdictional ground that this judgment practically settled the case, application was made to the Supreme Court for writ of error, which was granted, and that court, Chief Justice Gaines delivering the opinion (46 S. W. Rep., 43), without adverting to the decision

in Direct Nav. Co. vs. Ins. Co., held, as in the opinion by Justice Fly on the first appeal, that the act of March 4, 1891, was valid and effective as applicable to interstate commerce and was not an encroachment upon the powers of Congress—and so reversed the judgment of the court of civil appeals and affirmed that of the trial court.

This case is noteworthy because of the importance of the points involved and of the statute sustained, and also as affording an illustration of the difficulty of obtaining justice against a corporation suitably equipped to contest its liability under the law upon every point that able counsel can present to confuse the subject and defeat or delay a recovery by the plaintiff. From the recent decision of the United States Supreme Court in Railway vs. Solan, 18 Sup. Ct. Repr., 289, cited by Judge Gaines, we have the gratifying assurance that the State statute in question will escape the condemnation which the federal judiciary is prone to visit upon State laws that in any way touch upon its jurisdiction.

Hardin vs. State, opinion by Presiding Judge Hurt, with dissenting opinion by Judge Henderson, not yet published, presents an interesting decision of the question as to whether a person can be guilty of an assault with intent to rape a girl under the age of 15 years, she consenting to what was done, and the facts presenting a case of molliter manus imposuit. Our penal code originally defined rape substantially as at common law, but by a subsequent legislative amendment there was added to its definition and elements "with carnal knowledge of a female under the age of fifteen years, with or without consent, and with or without the use of force, threats or fraud."

Article 608 provides that "if any person shall assault a woman with intent to commit the offense of rape, he shall be punished," etc. Article 611 provides that "an assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with the intent to commit such other offense." Conceding the existence of such intent, what was there in the facts, the mollitur manus imposuit done with consent, to "bring the offense within the definition of an assault?" The opinion by Judge Hurt, announcing as the conclusion of the court that the facts of such a case do not amount to an assault with intent to rape, is distinguished by the clear logic that usually characterizes all opinions with which for nearly twenty years past he has enriched our criminal jurisprudence.

He agrees with the fair Juliet that there ought to be nothing

in a name, and declares the trouble in construction here to arise chiefly from an incorrect legislative use of the term "rape," as applied to carnal intercourse with consent. Had the legislature, he says, designated carnal knowledge with consent as fornication, which they could more appropriately have done than to have called it rape, no one would likely ever have heard of an assault with intent to commit fornication under that statute any more than under the existing statutes as to fornication. The decision is sustained by the decided weight of the English case, but the weight of American authority is against it.

The disssenting opinion by Judge Henderson is a masterly presentation of the other side of the question, and declares that as the female is incapable, in law, of consenting, her consent can no more deprive the touching of her person of its character as an assault to commit rape than it can deprive the consummated act of its character of rape. "I can not bring to mind," he concludes, "to believe that there is no law on our statute books for the punishment of such offenders. On the contrary, it appears to me that the attempt is here to construe away the law and to create a hiatus where there is none. I agree with the American authorities on this subject, because I believe them sound and in consonance with a proper construction of our statutes."

QUO WARRANTO—CONTESTED ELECTION.

In Buckler vs. Turberville, 43 S. W. Rep., 810, opinion by Chief Justice Finley, it is decided that in a quo warranto proceeding to contest an election a writ of error can not be prosecuted from the judgment of the trial court, but such case can be brought up only by appeal, as specially provided in art. 1804h of the Revised Statutes. The decision proceeds on the ground that the subject of contested elections being a matter of special cognizance and express provision in our constitution and statutes, is not embraced in the general statutes relating to civil controversies (Rev. Stats., arts. 1383 et seq.) authorizing an appeal or writ of error in "civil cases," and that the evident purpose of the law to secure a speedy determination of such cases would be defeated by engrafting upon the special statute a construction that would allow a writ of error in addition to the appeal for which only it provides. The dismissal by the Supreme Court of an application made to it for a writ of error in this case, for want of jurisdiction, recognizes the finality of the judgments of the courts of civil appeals in proceedings of this kind.

FOREIGN ASSIGNMENTS—COMITY.

In Carter-Battle Grocer Co. vs. Jackson, 45 S. W. Rep., 615, opinion by Chief Justice Finley, we have a judicial recognition of rights to personal property in this State acquired by virtue of an assignment for the benefit of creditors made in another State, such as is warranted by the broad principles of comity, as well as demanded for a proper administration of justice in a country the legal and business relations of whose people are so closely interrelated as are those of the people in the States composing our American Union. It establishes that an assignment for creditors made by a non-resident, valid under the laws of the State where made, and not prohibited by our own laws nor violative of public policy, will be recognized so having passed the title to the assignor's personal property situated in Texas, without actual delivery of such property having been made to the assignee, and without registry of the assignment in this State or actual notice of it on the part of creditors of the assignor seeking to fix a lien upon the property by attachment or garnishment. There is nothing in our registration laws, it is said in the opinion, which fixes a lien in favor of garnishing creditors upon debts or effects which have been assigned without notice to them prior to the service of the writ, nor is the registry of an assignment made necessary to its validity by the laws of this State; and so, as the assignor was no longer the legal owner of the property, it simply could not be made subject to process against him.

VOID JUDGMENT.

Maybin vs. Fitzgerald, 45 S. W. Rep., 611, opinion by Justice Neill, is noteworthy as presenting very clearly a single and somewhat novel point—that in an action of forcible entry and detainer a judgment in plaintiff's favor for possession at a future date is void. The evidence on the original trial showed that the defendant was then entitled to possession of the premises, and would be so entitled until the end of that year—so the jury returned this verdict: "We find for plaintiff, giving defendant the use of the place the balance of this year." The judgment was accordingly; but it was held by the appellate court that the justice court was wholly without jurisdiction to determine who would be entitled to the possession of real estate at a future day, as that would involve an adjudication of the title.

The bicycle has at last gotten into our appellate courts, but

as it was not ridden in by a married woman, it fared badly, and was led away to the place of execution by a sordid creditor of its owner. In Smith vs. Horton, opinion by Justice Rainey, not yet published, the defendant in execution set up that he needed the bike in his business, which was that of an architect and superintendent of buildings, in going rapidly from place to place, as his work required; that he had formerly used for that purpose a horse, which was exempt from execution, and as the bicycle took the place of the horse, he very plausibly claimed that it should be held exempt. But the court made answer to his plea after this fashion: That the bicycle could not possibly be held a "tool or implement" of his profession of architect, for it was equally as useful and available to the doctor, the traveling salesman and in every kind of business requiring locomotion; and that it was not the province of the courts, because of the mere fact of the great utility of the bicycle, to extend the exemption laws so as to include it.

Duke vs. Cleaver & Co., opinion by Justice Hunter, not yet published, is an interesting case, relative to the exclusive right to a trade name and sign, to-wit: "The Nickle Store," which appellant sought to enjoin the defendants (appellees) from using above their store, situated near his own—upon the ground that he had first adopted and had continuously used that name for his own store, and at large expense had advertised his business abroad under that name, both in newspapers and with painter's brush, whereby the rocks along the highways had been caused their everlasting silence to break, and to proclaim forth the wondrous bargains to be had at the said Nickle store, thus securing to plaintiff a large and lucrative patronage, which defendants deceitfully and fraudulently diverted to themselves by putting the name of "The Nickle Store" above their own place of business. An injunction was denied by the trial court, and plaintiff appealed; and appellee's contention, that the words "Nickle Store" being merely descriptive of the cheap character of goods sold there, could not constitute a sign or symbol capable of being appropriated, and in which plaintiff could acquire an exclusive interest, was not sustained by the court of civil appeals. The court points out that "nickle," as defined by Webster, means "the European green woodpecker, or yaffle, called also nicker pecker," a unique and beauteous specimen of the bird kingdom, a rara avis; wherefore its use in a sign might be highly symbolical, suggesting the maxim that the early bird gets the worm, rather than that the customer could get there for a nickle all the goods he could carry. Aside from this, how-

ever, and treating the word as intended for "nickel," it is held that the words "Nickle Store" were not descriptive of plaintiff's goods or his manner of doing business, and did not necessarily mean the same as "cheap store;" but as used by plaintiff constituted an arbitrary name such as he had no right to adopt—and that appellees had no right to appropriate the valuable patronage he had built up thereunder.

DAMAGES—EXPULSION FROM BENEFIT ASSOCIATION.

American Legion of Honor vs. Geisberg, 42 S. W. Rep., 781, opinion by Justice Pleasants (with writ of error refused by the Supreme Court) was a case wherein a member of a mutual benefit association was suspended for non-payment of dues, and within the time allowed by the rules of the order for reinstatement he tendered the amount due, which was erroneously refused by the collector, who having discovered his mistake as to the time being out promptly notified plaintiff, the suspended member, that the amount due would be accepted, if tendered that day, and he would thereupon be reinstated, but plaintiff made no further offer to pay, and two months later demanded of the head offices of the order payment of the amount of his benefit certificate (which was payable at his death), and this being refused, he brought an action for damages, and recovered judgment in the lower court. On appeal it was held that he had no cause of action and the judgment was reversed and rendered for the defendant. In behalf of plaintiff it was contended on appeal, that as payment of the dues in arrear was not actually made by him before the expiration of the time allowed for reinstatement, there was no authority in the collector or any other officer of the order to afterwards receive the money and reinstate him; but the court says that if, by reason of tender in due time and its wrongful refusal by the collector, plaintiff could force the order to reinstate him by application to the judicial power of the State, it is not consonant with reason or law that the defendant, acting through its proper officers, could not legally do voluntarily that which it could be compelled to do by judicial process. The case is of special interest because it deals with a comparatively new subject of the law, and one which presents many features that have not yet had judicial consideration.

COMMERCIAL LAW.

House vs. Kountze Bros., 43 S. W. Rep., 561, opinion by Chief Justice Garrett, decides an important and much mooted

question of commercial law, in its conclusion that an unaccepted check does not constitute an equitable assignment, *pro tanto*, of the fund against which it is drawn, and therefore will not sustain an action by the holder against the drawee. In the opinion, after a very clear and comprehensive presentation of the question and review of the extensive conflict of authority thereon, it is said: "In this State the question may be considered *res integra*, since our Supreme Court has never passed upon it. It came before the Court of Civil Appeals for the Fourth District, and that court, in an opinion by Chief Justice James, sustained the right to sue. Doty vs. Caldwell, 38 S. W. Rep., 1025. The old court of appeals held also to the same effect. Bank vs. Randall, 1 W. & W. C. C., sec. 975." Judge Garrett himself coincides in that view, holding the weight of reason to be in its favor, although the weight of authority may be the other way; but the majority of the court were of the opposite opinion, and the refusal of a writ of error in this case by the Supreme Court seems to complete the denial in Texas of the right of action against the drawee upon an unaccepted check.

LIBEL.

Dement vs. Houston Printing Co., 37 S. W. Rep., 985, same case, *sub nomine*, Houston Printing Co. vs. Dement, 44 S. W. Rep., 558, presents some noteworthy decisions upon the law of libel, such as pointedly exhibit the strictness with which the law holds the defendant liable in cases of this character. The defendant company had published in its newspaper, as an item of news sent in by its correspondent, the statement that plaintiff had, upon a charge of horse theft, been arrested and jailed, and this was shown to be true; but this phase of the truth was held no justification, it being shown on the other hand that the alleged charge of theft was false. The truth of the charge made, says Justice Williams, who delivered the opinion on the first appeal, must be proved in order to justify the publication. "If A. says of X. that he is a thief, and C. publishes that A. said X. was a thief, in a certain sense C. would publish the truth, but not in the sense that would constitute a defense, for C's publication would be in fact but a repetition of A's words."

It might seem to the unthinking multitude that as the arrest and incarceration on the charge made, were public acts of public officers, done in the line of public duty, the naked statement of such acts as public news would be privileged; but in reply to this plea it is pointed out that in these acts "there is no semblance of

a proceeding instituted and conducted in a court of justice"; nor I may add just here, any semblance of a strictly professional discussion of the matter, such as this, in a meeting of the Texas State Bar Association. If we lawyers who both judicially and judiciously declare the law, can not accord ourselves some little measure of privileges over and above what the newspapers have, then the historic query of Web Flannagan becomes pertinent as to us. On the second appeal, in an opinion by Justice Pleasants, the rulings on the former appeal are affirmed, and some further points of importance are decided. The original plaintiff having died before the second trial below, the action was prosecuted by his wife and children, by virtue of the act of May 4, 1895, providing "for the survival of causes of action for personal injuries other than those resulting in death." It was contended by the defendant that this act is void, because the subject of injuries are not included in the term "personal injuries"; but the validity of the act in this respect was upheld, and it was further decided that since the original plaintiff could have recovered damages for mental anguish occasioned by the publication, and the cause of action survived to his representatives, the then plaintiffs, they could likewise recover such damages.

In Squires vs. State, S. W. Rep., 147, the defendant in a criminal prosecution for libel appears to have fared somewaht better at the hands of the Court of Criminal Appeals, getting the judgment against himself reversed upon ground that to charge a candidate for office with political trickery and treachery to his party was not a charge of such dishonesty as rendered him unworthy of the office.

Worst v. Sgitcovich, 46 S. W. Rep., 72, opinion by Chief Justice James, presents an interesting point in relation to a sale of property by a survivor in community, the action being brought by plaintiffs to recover their interest in certain property which their mother had bought and had sold after their father's death. The statement of the point in the opinion is concise, and does not admit of condensation.

"Conrad Gerlach, the father of appellants, died in 1875, leaving certain community property. His widow qualified by giving a survivor bond, and the property in question was acquired by her by the use of community funds. She took the deed in her own name, and afterwards married C. C. Voight; and they, in course of time, sold the property to appellee. There was testimony tending to show that he had knowledge of the claim of the children to an interest in the property when he bought. We conclude that the use by the survivor of community funds

in purchasing property is not a conversion, in the sense that the children will be limited to an action on the bond for redress, assuming that they have such remedy in such case. There is no doubt in our minds that they have the right to claim the benefit to her investment. While she was still a widow, a sale by her of the property would have conferred full title on the purchaser; but when she married Voight her power in this respect was at an end, and she would thereafter be treated as holding the title in trust for the children, to the extent of their interest in the funds appropriated in its purchase. This being so, they would have the right to recover, to that extent, of the purchaser, unless he had purchased without notice of their right, or some other valid defense existed."

MEASURE OF DAMAGES.

The case of Field vs. Munster, 11 Texas Civ. App., 341, opinion by Justice Key, while not so very recent, has not been reviewed heretofore, and is a case of importance because it changes the rule in this State as to the measure of damages in that class of cases, viz: where goods of the wrong person are improperly levied on and sold under judicial process, and the owner himself buys them in at the sale, and at less than their actual value. Theretofore the measure of the owner's damages had been the market value of the goods at the time of their seizure, irrespective of what it had cost him at the sale to get them back; but this case, upon the ground that the theory on which damages are ordinarily allowed is that of compensation, enunciates the more equitable rule that the owner should receive only such damages as he actually sustained—in the case at bar, interest on the value of the property from the time of its seizure to its sale, the amount paid by him at the sale, with interest, and whatever amount the property may have depreciated in value while it was withheld from him. The judgment of the trial court having been reversed and the case remanded, the Supreme Court took cognizance of an application for writ of error solely upon the ground that the opinion conflicted with that of the Supreme Court in Schooler v. Hutchins, 66 Texas, 324, and also with that of another one of the courts of civil appeals; but upon consideration of the case, refused the writ of error with a very clearly expressed approval of the correctness of the rule laid down by Justice Key. See 89 Texas, 102. In Gardner v. Bell, 13 Texas Civ. App., 356, the Court of Civil Appeals for the Fifth District cites this case with approval, upon

the further point that it establishes the rule that some actual damage must be shown before any recovery for damages can be had.

EQUITY.

Anderson vs. Rowland, 44 S. W. Rep., 911, opinion by Chief Justice Fisher, is a noteworthy illustration of the extent to which courts of equity have advanced and applied the principles of equity jurisprudence. In this case it was decided that a purchaser of land may be charged with a restriction as to its use of which he had notice, although the restriction does not create an easement, and is not technically a covenant running with the land, nor contained in the deed to the purchaser, nor in any deed in his chain of title. The facts were these: S., owning a block of land in a city, sold a lot to R., a saloon man, stipulating and agreeing in the deed that he, the vendor, would not run or permit to be run any other saloon in any building in that block for five years, whether he continued to own the property or not. Afterwards, by deed in usual form and without any restrictions in it, he sold another lot in that block to C., who knew, however, of the condition in the deed to R., and who proceeded to open up a saloon on this second lot which he had just bought. R. thereupon brought suit against C. and his tenant to restrain them from carrying on such saloon business there; and it is held that he was entitled to a permanent injunction, upon the ground that C. took subject to the agreement in the deed to R. because he knew of it, and it was a valid agreement; that injunction was the proper remedy because there was no adequate remedy at law, and that it was not necessary for the plaintiff to show damages in order to obtain an injunction to enforce a covenant to refrain from engaging in a particular business. The decision appears to be fairly well founded in the principles of equity and right, and to be warranted by the authority of a number of English and American cases cited: but it will be confessed that it goes as far as it is expedient for the merely temporal courts to go. Indeed it comes very near engrafting into our equity jurisprudence, as one of its operative provisions, the golden rule of the Scriptures, that we should do unto others as we would have others do unto us. From a selfish and purely business point of view, it might seem a sufficient answer to C., the second purchaser, to say that no such restrictive agreement was made a part of the contract of sale to him, and that if it had been insisted upon, he would have declined buying; that for any damages for the violation of such agree-

ment R. must look to the party who made and who violated it, and that as the parties had not made such agreement a covenant running with the land he had bought, equity should not engraft it as a charge upon the land in his hands merely because he happened to know of it.

If this equitable provision is to be generally applied, it may well be held, by analogy, that when a girl who has promised to marry A. afterwards marries B. and he knew of the prior existing agreement, A. will be entitled to an injunction restraining further proceedings in the premises, and to have them perpetually enjoined, unless indeed improvements should have been made of a permanent and valuable character before service of the writ, such as would introduce a countervailing equity. When the Supreme Court of Judicature Act of Great Britain, wherein it was proposed to combine legal and equitable rights and remedies in the same action and administer them by the same tribunals, was pending before the English parliament, it was strenuously urged in objection that the inevitable result would be that equitable proceedings and doctrines would be gradually supplanted and displaced by the more inflexible and arbitrary rules of law; and to avert this danger an amendment was adopted providing that "Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." Mr. Pomeroy, in his Equity Jurisprudence, claims that the blending of law and equity jurisdiction in the American States, without such a provision as above, has actually had the effect so anticipated, and has caused a weakening and disregard of equitable principles in the administration of justice; but this case of Anderson vs. Rowland may certainly be cited not only as strongly to the contrary of that assertion, but also as showing almost a reversal of the maxim, *Æquitas legem sequitur.*

It is a matter of regret that the limitations of inexorable time will not permit a more extended resume of the decisions and a notice of some other interesting and important cases included in the work of our higher courts for the past year—a work which, in its entirety, is eminently satisfactory to the bar and the people of our State. It certainly affords me sincere pleasure to voice here that feeling of satisfaction, and to express the pride we have in the ability, integrity and high character of our appellate judiciary. And it is indeed fitting that it should be of this character, for law is the perfection of reason and the highest embodiment and exercise of civic power, and its final de-

termination properly stands at the very summit of human wisdom. In our triune system of government the judicial department is in the ultimate of the law, superior to both the legislative and executive branches, and may aptly be termed the keystone of the arch in the political structure. The illustrious John Marshall has well declared it to be something that comes home in its effect to every man's fireside, passing upon his property, his reputation, his life, his all; and that the wrath of heaven could not inflict upon a disobedient people a greater curse than that of an incompetent, corrupt or dependent judiciary. While the work so far accomplished is a most admirable one, our judiciary has a yet grander task and mission before it in the years that are still to come. "Men may flatter themselves," said Edmund Burke, "that now, at least, all is settled; but no! our laws are written upon the sands of time, and may be effaced by the shifting winds of popular opinion; new laws are to be made, and your old writing renewed and changed." All the civilizations of the past reached their climax, decayed and fell ere they had advanced as far as the point to which we have now attained; and the century upon which we are soon to enter will present for solution questions more complicated and more momentous than any with which human wisdom has ever yet had to deal. In my humble judgment—and I am not alone in this opinion—the perpetuity of our republican government here, if not also the continued existence of civilization itself, will ere long come to depend, with increasing force, upon the wisdom and immutable integrity of the judiciary of this country and its ability to withstand the almost irresistible influence and Titanic power which wealth commands, while it is engaged in the determination of questions such as are involved in the income tax cases, where the interests of the masses of the people shall stand opposed to those of an array of combined and incorporated capital mightier in extent and more resourceful than ever before existed in the history of mankind. That we may continue to have in the future, as now, and as in the past, a judiciary whose work will add increased lustre and renown to the jurisprudence of our State and endure as a monument *aere perennius* long after those that wrought it shall have crumbled into indistinguishable dust, is the cherished wish of every true patriot and lover of liberty whose highest desire is the advancement of the welfare and happiness of his race.

TEXAS BAR ASSOCIATION.

CONSTITUTION.

ARTICLE I.—NAME AND OBJECTS OF THE ASSOCIATION.

SECTION 1. This Association shall be called the TEXAS BAR ASSOCIATION.

SEC. 2. Its objects shall be to advance the science of jurisprudence, promote the uniformity of legislation in the administration of justice throughout the State; uphold the honor of the profession of the law and encourage cordial intercourse among its members.

ARTICLE II.—MEMBERSHIP.

SECTION 1. Any attorney of the Texas bar, in honorable standing, upon his written application, may be admitted to membership at any regular meeting of the Association. Said application must be endorsed by three members of the Association, and a fee of $5.00 shall accompany the same—$2.50 initiation fee and $2.50 annual dues.

SEC. 2. Such application shall be referred to the Board of Directors, who shall report the same to the Association, and if said report be favorable, a ballot shall be taken, and if four-fifths of the members voting shall be in favor of the applicant he shall be declared elected.

ARTICLE III.—OFFICERS AND THEIR DUTIES.

SECTION 1. The officers of the Association shall be a President, a Vice-President, a Secretary and a Treasurer, who shall be chosen by ballot at a regular meeting, by a majority of the members present and voting.

SEC. 2. There shall be a board of Directors, five in number, elected at the same time and in the same manner with the officers; and the President and Vice-President shall be ex-officio members of the Board.

SEC. 3. The officers and Directors shall hold their places for one year and until their successors shall be elected; provided, that the same person shall not be elected President two years in succession.

SEC. 4. The duties of officers shall be such as usually devolve upon such positions, and may be regulated and prescribed from time to time by the Constitution, By-Laws, or resolutions of the Association.

SEC. 5. The Board of Directors shall have exclusive authority, and shall exercise executive supervision over the affairs of the Association between its meetings.

SEC. 6. Vacancies in the offices and Board of Directors shall be filled by the Board, the concurrence of a majority of whom shall be necessary to a choice.

ARTICLE IV.—COMMITTEES.

SECTION 1. The following committees shall be appointed annually by the President for the year ensuing, and shall consist of five members each: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Criminal Law and Criminal Procedure; on Commercial Law; on Publication; on Grievances and Discipline.

SEC. 2. A committee of three, of whom the Secretary shall always be one, shall be appointed by the President at each annual meeting of the Association, whose duty it shall be to report to the next meeting the names of all members who shall in the interval have died, with such notices of them as shall, in the discretion of the committee, be proper.

ARTICLE V.—GENERAL POWERS.

SECTION 1. This association shall have power to impose fines, assess fees, and establish by-laws for its government. It shall have power to remove officers and suspend or expel members for good cause, upon written charges exhibited against them by a member, and due notice given of the charges and of the time they will be brought before the Association.

SEC. 2. The By-Laws shall prescribe the assessment to be levied on the members for the support of the Association and the promotion of its objects.

ARTICLE VI.—QUORUM.

SECTION 1. Twenty-five members in regular standing shall constitute a quorom for the transaction of business.

ARTICLE VII.—ANNUAL ADDRESS.

SECTION 1. The President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice.

ARTICLE VIII.—MEETINGS.

SECTION 1. A majority of the members present at an annual meeting of this Association shall designate the time and place for holding ing the next annual meeting.

ARTICLE IX.—AMENDMENTS.

SECTION 1. All propositions to alter, amend or add to this Constitution shall be made in writing at a meeting of the Association, and filed with the Secretary at least one month before being acted upon, and shall not be adopted without the concurrence of two-thirds of the members present.

ARTICLE X.—DUES.

SECTION 1. Each member of the Association shall pay to the Secretary the sum of $2.50 as annual dues.

BY-LAWS.

ARTICLE I.—PRESIDING OFFICERS.

SECTION 1. The President, and in his absence the Vice-President, shall preside at all meetings of the Association; if neither of these officers be present, a President pro tem. shall be chosen by and from the attending members.

ARTICLE II.—ADDRESS AND ESSAYS.

SECTION 1. The Board of Directors, at its first meeting after each annual meeting, shall select some person to make an address at the next annual meeting, and not exceeding six persons to read papers.

ARTICLE III.—ANNUAL MEETINGS AND ORDER OF BUSINESS.

SECTION 1.—The order of exercises at the annual meeting shall be as follows:

1. Opening address of the President.
2. Nomination and election of members.
3. Report of the Board of Directors.
4. Election of the Board of Directors.
5. Reports of Secretary and Treasurer.
6. Reports of Standing Committees, as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Commercial Law; on Publication; on Grievances and Discipline.
7. Reports of special committees.
8. Miscellaneous business.
9. Nomination and election of officers.
10. Selection of time and place for next annual meeting.

The annual address, to be delivered by the person selected by the Board of Directors, shall be made at the morning session of the second day of the annual meeting.

SEC. 2. This order of business may be changed at any meeting by a vote of a majority of the members present; and, except otherwise provided by the Constitution or By-Laws, the usual parliamentary rules and orders will govern the proceedings.

SEC. 3. No person shall speak more than ten minutes at a time, nor more than twice on the same subject.

SEC. 4. A stenographer shall be employed at each annual meeting.

SEC. 5. Each county bar association may annually appoint delegates, not exceeding three in number, to the next meeting of the Association, and such delegates shall be entitled to all the privileges of membership at and during said meeting.

SEC. 6. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the reports of the committees and proceedings of the annual meetings shall be printed, but no other address made or paper read or presented shall be printed except by order of the Committee on Publication.

SEC. 7. The Board of Directors shall, as soon as parties have been selected to deliver the annual address and read essays, notify the Secretary of this Association of such selections, and of any other matters of especial interest to be brought before the next annual meeting.

Sec. 8. The Secretary shall be and is hereby required to mail each member of the Association, ten days before each annual meeting, a written or printed notice of the time and place of such meeting, giving a statement of the addresses to be delivered, the papers to be read, and other matters of especial interest, and shall also cause such notice to be published.

ARTICLE IV.—MEMBERSHIP AND DUES.

SECTION 1. The initiation fee to entitle a person to membership shall be five dollars, which shall include the annual dues for the first year.

SEC. 2. The annual dues shall be payable at the annual meeting, in advance, and should any member neglect to pay them for one year at or before the next annual meeting, he shall cease to be a member. The Secretary shall give notice of this By-Law, within sixty days after each meeting, to all members in default.

ARTICLE V.—OFFICERS AND COMMITTEES.

SECTION 1. The terms of office of all officers elected at the annual meeting shall commence at adjournment thereof, except the Board of Directors, whose term of office shall commence immediately upon their election.

SEC. 2. The President shall appoint all committees, except the Committee on Publication, within thirty days after the annual meeting, and shall announce them to the Secretary, who shall promptly give notice to the person appointed. The Committee on Publication shall be appointed on the first day of each meeting.

SEC 3. The Secretary's and Treasurer's reports shall be examined and audited by the Board of Directors before their presentation to the Association.

SEC. 4. The Board of Directors and all standing committees shall meet on the day preceding each annual meeting, at the place where the same is to be held, at such hours as their respective chairmen shall appoint, and should any member of any committee be absent, the vacancy may be filled by the members of the committees present.

SEC. 5. The Committee on Publication shall meet within one month after each annual meeting at such time and place as the chairman shall appoint.

SEC. 6. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint; reasonable notice shall be given by him to each member by mail.

ARTICLE VI.—DUTIES OF COMMITTEES.

SECTION 1. It shall be the duty of the Committee on Jurisprudence and Law Reform to consider and report to the Association such amendments to the law as in its opinion should be adopted; also to scrutinize proposed changes in the law, and when necessary, report upon the same.

SEC. 2. It shall be the duty of the Committee on Judicial Adminis-

tration and Remedial Procedure to observe the practical working of the judicial system of the State, and recommend by written or printed report, from time to time, any changes therein which observation and experience may suggest.

SEC. 3. It shall be the duty of the Committee on Legal Education and Admission to the Bar to report the most suitable means for promoting and facilitating the study of the law, and the necessity or propriety of elevating the standard of qualifications for admission to the bar, and the best means for accomplishing that object.

SEC. 4. It shall be the duty of the Committee on Commercial Law to report the best means to produce uniformity in commercial law and usages.

SEC. 5. The Committee on Publication shall pass upon and have printed all papers, should they deem them of sufficient importance, except as it is otherwise provided by the Constitution and By-Laws.

SEC. 6. The Committee on Grievances and Discipline shall report as to the best means of upholding the honor and dignity of the law in the professional intercourse among the members of the Association. All complaints against any member of this Association shall be presented to this committee, and if the committee shall be of the opinion that the matters alleged are of sufficient importance, they will determine upon the course of procedure for the trial of the same; and shall give notice to the party charged of the nature of the complaint and the time of the trial thereof by the Association; all of which the complainant shall also be notified by the committee.

ARTICLE VII.—RESOLUTIONS.

SECTION 1. No resolutions complimentary to any officer or member, for any service performed, paper read or address delivered, shall be considered by this Association.

ARTICLE VIII.—AMENDMENTS.

SECTION 1. These By-Laws may be amended at any meeting of the Association, by a vote of two-thirds of those present: provided, that a copy of the proposed amendment shall have been filed with the Secretary on or before the first day of such annual meeting.

RULES FOR THE COURTS OF TEXAS.

Adopted by Order of the Supreme Court, October 8, 1892, as amended by Order of the Supreme Court, June 29, 1895, and amended November 8, 1897.

NOW IN FORCE—NOVEMBER 15, 1898.

RULES FOR THE SUPREME COURT.

1. Applications for writs of error shall consist of a petition addressed to this court, embracing specific assignments of error confined to the points of law presented in the motion for rehearing in the Court of Civil Appeals; of the original papers containing the conclusions of law and fact of the latter court (including their statement of the case and opinion) and of the original motion for a rehearing, all of which original papers, as well as the transcript of the proceedings in the trial court, and a transcript of the orders and judgment of the Court of Civil Appeals, and the briefs filed therein, shall accompany the petition. A motion for a rehearing must be made in the Court of Civil Appeals and overruled before applying for the writ of error. The petition for the writ shall be as brief as practicable, and need only contain the requisites prescribed by the statute. The statement of the case by the Court of Civil Appeals, their conclusions of fact and law, and their opinion will be deemed a part of the petition without being referred to therein, and if it appear therefrom that the case belongs to the class over which as a general rule the jurisdiction of the Court of Civil Appeals is not made final by the statute, and that the judgment has been affirmed, the facts to show jurisdiction in this court need not be alleged, but if it appear therefrom that the case belongs to either of the classes over which as a general rule the Courts of Civil Appeals have final jurisdiction, or that the judgment has been reversed with an order remanding the case, then the petition must contain averments showing that the case comes within some one of the exceptions contained in the statutes, so as to make the jurisdiction of this court apparent. The opinion together with statement of the case and the conclusions of the Court of Civil Appeals will be read by the court in connection with the application, so that no matter will be stated in the petition which appears in such statements, conclusions and opinion. If in the opinion of counsel the statement of the case as made by the Court of Civil Appeals is sufficiently full and

accurate to present properly the questions to be determined by the court, no additional statement should be made under any assignment; but if not, then under each assignment counsel will make a statement, pointing out the alleged omissions, inaccuracies or errors in the court's statement and conclusions of fact so far as may be deemed necessary to properly present the question raised by such assignment, and will support it by reference to the transcript of the proceedings in the trial court. The reference shall cite the particular part or parts of the transcript relied upon, noting the page and line, both of the beginning and of the ending of the matters referred to. Each assignment and statement, if there be any, may be followed by such argument and citation of authority as counsel see proper to present.

2. The clerk of this court shall receive all applications for writs of error, and file the petition and accompanying transcript from the Court of Civil Appeals, and enter the case upon a docket kept for that purpose, known as the application docket. But he shall not be required to take the same from the postoffice or an express office unless the postage or express charges as the case may be shall have been fully paid. The cases shall be numbered consecutively on the application docket and the number shall be placed upon the application.

3. The application, when filed in accordance with law, shall be deemed submitted to the court and ready for disposition, unless the applicant shall file with his petition a request for time in which to present a brief or written argument, in which case a period of time not exceeding ten days may be allowed him for that purpose. The applicant, should he so select, may cite his authorities in his petition or may file a separate brief or argument.

4. Upon a refusal by this court of an application for a writ of error, the clerk of this court shall transmit with the least practicable delay to the clerk of the Court of Civil Appeals to which the writ of error was sought to be sued out, a certified copy of the order of this court denying such application; and shall return all the file papers of that court to the clerk thereof, but shall not return the petition for the writ of error.

5. If the application be granted, the clerk shall issue a writ of error to the judges of the court, the judgment of which is sought to be revised, advising them that the writ of error has been granted, and the clerk shall also issue a citation to the defendant or defendants in error, or to his or their attorneys of record, notifying him or them that the writ of error has been granted and of the date thereof, and to appear and defend the same. Said citation shall be returnable in ten days, and in the event it be not served, the clerk shall issue other successive citations until due service is had. Service of

the citation upon one attorney will be deemed service upon all parties represented by him. If no bond be required the citation and writ of error shall issue immediately upon the granting of the application. If a bond be required the writ shall issue upon receipt of the duly certified copy of the bond prescribed by the statute. Unless further time be allowed by special order of the court in the particular case the certified copy must be filed in this court within ten days from the granting of the application. If the copy be not so filed, the application will be dismissed by the court of its own motion.

5a. Whenever in any case in which a writ of error has been granted or in which such writ may hereafter be allowed, it shall be made to appear to the clerk of this court by the affidavit of a plaintiff in error his agent or attorney, that the defendant in error has no attorney of record and either that he is beyond the limits of the State or that his residence is unknown, so that it is impracticable to serve citation upon him in the ordinary method provided by law, it shall be the duty of the clerk of this court upon the plaintiff in error making provision for the payment of the expense thereof, to cause notice of the granting of the writ to be published once each week for four successive weeks in some newspaper published in the county in which the case was tried; or a notice of the granting of the writ may be issued by the clerk of this court and may be served upon the defendant in error and returned in the manner provided by Articles 1230, 1232 and 1233 of the Revised Statutes, except no copy of the petition for the writ of error need be served. Notice given in either of the two modes herein provided shall have the same effect as service of citation as provided in Rule 5; and the publication or service of notice may be proved by the affidavit of any person, deposited with the clerk and filed among the papers in the cause.

6. When service of the citation in error shall have been had, it shall be the duty of the clerk to put the case upon the trial docket and to mark upon the file the number of the case as shown upon such docket. Cases upon the trial docket shall be numbered consecutively in the order in which they are entered thereon.

7. Causes in this court will be regularly submitted on Thursday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.

8. A case shall stand for submission upon the first regular day of the submission of causes coming after the expiration of twenty days from the day on which the writ of error shall have issued; provided the citation in error shall have been served ten days before such submission day. If not so served then the case shall be subject to submission on the first regular submission day which falls ten days after service of the citation.

9. Motions in a case not submitted will be heard on the day

next preceding the submission day for such case and the adverse party will be required to take notice of all motions filed in the cause on or before the Tuesday immediately preceding such submission day. Notice shall be given of all motions filed after that time.

10. The clerk shall keep a motion docket upon which shall be entered every motion as soon as filed. The motions shall be numbered consecutively upon the docket and its number shall be placed on the motion itself.

11. A party who elects to file in this court a brief in addition to the brief filed in the Court of Civil Appeals, shall comply as near as may be with the rules prescribed for briefing causes in the latter court, and shall confine his briefs to the points raised in the motion for a rehearing and presented in the application for a writ of error.

12. When any Court of Civil Appeals shall certify to this court any question for determination, or shall send to this court any cause upon a certificate of dissent, either upon its own motion or that of any party, the certificate, in either case, shall be accompanied by the briefs filed in the Court of Civil Appeals; and the clerk of this court shall, upon the receipt of the briefs, issue notices to the attorneys whose names appear thereon of the day on which the question or cause as the case may be, shall be set down for submission.

13. The rules prescribed for the Courts of Civil Appeals as to the custody of transcripts, the argument of causes and as to the notices to attorneys of the disposition of cases, shall govern in this court.

RULES FOR THE COURTS OF CIVIL APPEALS.

TRANSCRIPTS.

1. The clerks of the Courts of Civil Appeals shall receive the transcripts delivered and sent to them, and receipt for the same if required, but they shall not be required to take a transcript out of the postoffice, or an express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, notice of appeal and a proper appeal bond or affidavit in lieu thereof (where bond is required) have been given; and in case of a writ of error, whether or not the citation in error appears to have been duly served, and error bond or affidavit in lieu thereof (where such bond is required) appears to have been filed. If it seems to him that the appeal or writ of error has not been duly perfected he shall note on the transcript the day of its reception and refer the matter to the court. If, upon such reference, the court shall be of opinion that the transcript shows that the appeal or writ of error has been duly perfected, they shall order the transcript to be filed as of the date of its reception. If not, they shall cause notice of the

defect to issue to the attorneys of record of the appellant or plaintiff in error, as the case may be, to the end that they may take steps to amend the record, if it can be done, for doing which a reasonable time shall be allowed. If the transcript do not show the jurisdiction of the court, and if after notice it be not amended, the case shall be dismissed.

2. The clerk shall indorse his filing upon the transcript, of the date of his reception, if it comes to his hands properly indorsed, showing who applied for it, and to whom it was delivered, if presented within ninety days from the time the appeal or writ of error is perfected. But if it comes to his hands after the said date, or not so properly indorsed, he shall, without filing it, make a memorandum upon it of the date of its reception, and keep it in his office, subject to the order of the person who sent it, or to the disposition of the court. Said transcript shall not be filed until a satisfactory showing has been made to the court for its not being properly indorsed, or for not being received by the clerk in proper time; and upon this being done, it may be ordered by the court to be filed, upon such terms as may be deemed proper, having respect to the rights of the opposite party.

3. Either party may file the transcript for which he has applied to the district clerk, and which has been delivered to him; both of which facts must appear on the transcript by the indorsement of the district clerk. If the indorsement shows that it was applied for by one party and delivered to the other, it must be shown by the indorsement of the clerk, or otherwise, to entitle it to be properly filed as the transcript of the party to whom it was delivered, and that it was delivered to one by the consent of the other, as each party has the sole right to the transcript which he applied for to be made out for him; and if it is so filed, without that fact being shown, the court may strike the case from the docket as improperly filed, upon its own inspection, or upon motion of the party to whom the transcript belonged.

4. If both parties file transcripts within the proper time—which they may do—and that of the appellant or plaintiff in error is properly made and indorsed, it shall be regarded by the court as the transcript of the record in the case, and the court will grant the appellee or defendant in error leave to withdraw that filed by him for his own use.

5. If but one party file his transcript in proper time, that shall be regarded as the transcript of the record in the case.

6. From the time when the transcript, properly made out and indorsed, is filed, it will cease to belong to either party, but will become a record of the court, subject to its control and disposition.

7. Transcripts in appeals from judgments in proceedings in *quo warranto* shall be filed in the Court of Civil Appeals within twenty days after appeal is perfected, and the first Tuesday following such twentieth day shall be the day for filing motions in such cases.

7a. If the transcript when filed in the Court of Civil Appeals shall not be indexed, as required by Rule 92 of the rules for the government of the District Courts, the Court of Civil Appeals may cause a proper index to be made by the clerk of their court, and shall cause the costs of the same to be taxed against the plaintiff in error or appellant, as the case may be.

MOTIONS.

8. All motions relating to informalities in the manner of bringing a case into court, shall be filed and entered by the clerk on the motion docket at least forty-eight hours before 10 o'clock a. m. of the day on which "the cause is set for a hearing," under section 23 of the act entitled "An act to organize the Courts of Civil Appeals, to define their jurisdiction and powers, and to prescribe the mode of procedure therein," approved April 13, 1892; otherwise the objection shall be considered as waived if it can be waived by the party; such filing and docketing will be sufficient notice of the motion.

9. Motions to dismiss for want of jurisdiction to try the case, and for such defects as defeat the jurisdiction in the particular case, and can not be waived, shall also be made, filed and docketed at said time, which filing and docketing shall be notice of the motion; *provided*, however, if made afterwards, they may be entertained by the court, after such notice to the opposite party as the court may deem proper to have been given under the circumstances.

10. Motions, made either to sustain or defeat the jurisdiction of the court, dependent on facts not apparent in the record and not *ex officio* known to the court, must be supported by affidavits or other satisfactory evidence.

11. Motions for *certiorari* to perfect the record shall also be made in the time required in Rule 8. They must be accompanied with a sworn statement showing a necessity for the same, unless the record shows it, the filing and docketing of which shall be notice of the same. If made afterwards, they will be entertained only upon such terms and upon such notice as the court may deem proper. Unless reason appear to vary the rule, the party applying, in all cases, will be taxed with the costs.

12. Motions made to postpone the case to a future day, or to continue it until the next term, unless consented to by the oppo-

site party, shall be supported by sufficient cause, verified by affidavit, unless such sufficient cause is apparent to the court.

13. The motion docket shall be called on the day of each week next before the day set apart for the submission of causes, when the motions filed and docketed according to the preceding rules will be in order for submission at the instance of either party; and if not submitted then, may be submitted at the regular call of the trial docket, unless sooner called up and disposed of.

14. The arguments of counsel upon all motions shall be confined to a brief explanation of the grounds in the motion, so as to make them intelligible to the court, with a reference to the statutes and decisions relating thereto, unless further argument is requested by the court.

15. The clerk, upon filing and docketing a motion, will indorse upon the motion its number and the number of the case to which it belongs, which shall also be entered in the motion docket, together with the attorney's name who makes the motion. Any opposition in the way of answer to said motion by the opposite party may be filed, and in like manner indorsed and noted in the motion docket, and the name of the attorney therein entered.

THE DOCKET.

16. The clerk, before the regular call of the trial docket, shall have the file number indorsed on each transcript. Where briefs have been filed in a case, the name of the attorney or attorneys signed to the brief shall be entered by the clerk on the trial docket, opposite the name of the appropriate party, and that shall indicate to the court who appears for such party in the cause.

17. The clerk shall not make such entry of an attorney's name until he shall have filed his briefs; but he shall permit any attorney who desires to make an appearance in the case before he files his briefs, or without filing them at all, to place his name, in his own handwriting, upon the trial docket, opposite the name of the party for whom he appears, and that shall be regarded by the court as having whatever effect is given to the mere appearance of a party to a case in court without brief filed.

18. The court will not enter upon the docket the names of attorneys in a case, but counsel desiring their names entered shall see that it is done under the foregoing rule before the case is called.

19. Counsel desiring to call the attention of the court to a case on the motion docket or trial docket, not then called in its

regular order, must, before doing so, provide himself with the number of the case on the docket.

CALLING THE DOCKET.

20. The trial docket will be called in regular order, according to the filing of the cases as they stand thereon, commencing with the first of those that have not been previously submitted, but the court shall not be required to take the submission of a case until the business on hand will admit of a prompt disposition after the submission has been taken.

21. Upon the call of the trial docket for the submission of cases, either party may submit a cause if it appears to have been properly prepared for submission on his part, unless, for good cause, the court shall postpone the hearing to a further day, or by agreement of counsel to a future day of the term, which will not be done so as to interfere with the business of the court. This rule is subject to exceptional cases given a preference to under some law or rule of the court, and to the action of the court on motions for the postponement and continuance of causes.

PREPARING A CAUSE FOR SUBMISSION.

22. A cause will be properly prepared for submission only when a transcript of the record exhibits a cause prepared for appeal in accordance with the rules prescribed for the government of the district and county courts, and filed in the court under the rules, with briefs of one or of both the parties, in accordance with the rules for the government of the court.

23. Said record should contain an assignment of errors as required by the statute. If it does not, the court will not consider any error but one of law that may be apparent upon the record, if the judgment is one that could legally have been rendered in the lower court and affirmed in the appellate court.

24. The assignment of errors must distinctly specify the grounds of error relied on, and a ground of error not distinctly specified, in reference to that which is shown in the record, or not specified at all, shall be considered as waived, unless it be so fundamental as that the court would act upon it without an assignment of errors, as mentioned in Rule 23.

25. To be a distinct specification of error, it must point out that part of the proceedings contained in the record in which the error is complained of, in a particular manner, so as to identify it, whether it be the rulings of the court upon a motion, or upon any particular part of the pleadings, or upon the admission or the rejection of evidence, or upon any other matter relating to the cause or its trial, or the portion of the charge given or refused,

the fact or facts in issue which the evidence was incompetent or insufficient to prove, the insufficiency of the verdict or finding of the jury, if special, and the particular matter in which the judgment is erroneous or illegal, with such reasonable certainty as may be practicable, in a succinct and clear statement, considering the matter referred to.

26. Assignments of error which are expressed only in such general terms as that the court erred in its rulings upon the pleadings, when there are more than one, or in its charge, when there are a number of charges, or the verdict is contrary to law, or to the charge of the court, and the like, without referring to and identifying the proceeding, will not be regarded by the court as a compliance with the statute requiring the grounds to be distinctly specified, and will be considered as a waiver of errors, the same as if no assignment of errors had been attempted to be filed.

27. In cases submitted to the judge upon the law and facts, the assignments of error shall be governed by the same rules as in other cases, and the party desiring to appeal should, as a predicate for specific assignments of errors, request the judge to state in writing the conclusions of fact found by him separately from the conclusions of law. And in agreed cases under the statute the foregoing rules as to assignments of error shall be complied with as far as practicable.

28. There will be no assignment of errors allowed in the Appellate Court when none has been filed in the lower court, unless by consent of parties.

BRIEFS.

29. The appellant or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on, in accordance with and confined to the distinct specifications of error (which assignments shall be copied in the brief) and to such fundamental errors of law as are apparent upon the record, each ground of error being separately presented under the proper assignment; and each assignment not so copied and accompanied with its appropriate propositions and statements, shall be regarded as abandoned.

30. The appellant or plaintiff in error in preparing his brief shall, as an introduction, make a general and succinct statement of the nature and result of the suit, followed by a statement of all the material facts proved upon the trial, in so far as they bear upon the issues to be presented, specifying the facts upon which there is a conflict in the evidence, and giving the substance of the evidence adduced by each party upon such conflict. This

statement will be accepted by the court as true, unless the appellee or defendant in error shall object to it and point out wherein such statement is incorrect, when the court will examine the record to ascertain which statement is sustained by the record. Then each point under each one of the assignments relied upon shall be stated in the shape of a proposition, unless the assignment itself is in the shape of a proposition to be maintained, and then it will be sufficient to copy the assignment. And in the event that either party in the brief submitted by him should fail to comply with the foregoing requirement, or with any other requirement prescribed by these rules, it shall be the duty of the court, of its own motion, either to strike out the brief, and to require a proper brief to be filed, or to require it to be amended, as in the discretion of the court may be deemed best. Upon failure of the party to comply with the order of the court requiring a new brief to be filed, or an amendment to be made, the court shall, if the plaintiff in error or appellant be at fault, dismiss the cause, and if the fault be on part of defendant in error or appellee, shall disregard his brief.

31. To each of said propositions there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. This statement must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it, and without intermixing with it arguments, reasons, conclusions or inferences. But an argument bearing only on the propositions submitted may follow each statement. But it shall be neither necessary nor proper to repeat in such statements what has already been presented in the general preliminary statement required by the preceding rule. It shall be sufficient in such case to refer to such preliminary statement by the page or pages of the brief on which the particular matter is found.

32. The propositions, if more than one under one ground of the assignment, shall refer to it, and be stated separately.

33. In a proposition relating to the error of the court in overruling a motion for a new trial or to arrest the judgment, in which there are several grounds, the particular ground or grounds should be referred to with the appropriate explanation; and if the same grounds of error have been presented in other propositions, it will be unnecessary to repeat them.

34. In propositions relating to fundamental errors of law apparent upon the record, enough must be stated to make the error

of law which pervades the case obviously apparent, without requiring the court to search through the record to find errors, which they will not do unless properly pointed out, if the judgment is one which the trial court is competent to render in such a case.

35. When the assignments of error are numerous, counsel should present propositions on those which are most important in the determination of the case, waiving those that can not control the result of the decision in this court—amongst which may be classed those involving questions of fact, wherein the evidence is so preponderating, or so conflicting, as that the court, under well established rules of decision, would not set aside the verdict of the jury or judgment of the court upon them.

36. There should be annexed to each proposition, with its statement, and at the end of it, a reference simply to the authorities relied on, if any, in support of it, in the following order, to-wit: The statutes and decisions of this State; the statutes and decisions of the United States, if they are applicable to the case; elementary authorities; other decisions in the American and English courts. In citing decisions, those most nearly in point should be cited first, and they should not, usually at least, be so numerous as to require a waste of time in their examination.

37. The brief of the parties, framed in accordance with these rules, must be signed by the party or his counsel; and if by counsel, it shall appear for and on behalf of what party, or parties, by name, it is signed; and the copies thereof filed in the Appellate Court shall be plainly written or printed, and if it covers more than eight pages of foolscap, they shall be printed.

38. Such brief may be amended by a citation of additional authorities to the respective points or propositions made in it, which must be filed and notice of it given to the counsel for the opposite party, if in attendance, one day before the case is called. No other amendment to the brief shall be allowed by the court, unless it is or can be done without injustice or unreasonable inconvenience being thereby imposed on the other party.

39. The failure of appellant or plaintiff in error to file an assignment of errors and briefs in the lower court, and in the Appellate Court in the time and in the manner prescribed by law and by the rules, shall be ground for dismissing the appeal or writ of error for want of prosecution, by motion made by appellee or defendant in error, as other motions under Rule 8, unless good cause is shown why it was not done in the time and manner as prescribed, and that they have been filed at such time and under such circumstances as that the appellee or defendant in error has reasonably not suffered any material injury in the defense of the

case in the Appellate Court. In deciding said motion, the court will give such direction to the case as will cause the least inconvenience or damage from such failure, so far as practicable.

40. When it shall be found that the rules prescribed for the preparation of a case for submission have been fully complied with by the appellant or plaintiff in error, the court will, in its discretion, regard this brief as a proper presentation of the case, without an examination of the record as contained in the transcript, and may found its decision thereon, unless the appellee or defendant in error shall, by the time of calling of the case, file in the Appellate Court copies of his brief, to be kept there with the transcript, containing his objections, succinctly and definitely, to the grounds of error as presented in the propositions of appellant or plaintiff in error in his brief, taking up each of them in order, and stating such other matters contained in the record, in the mode prescribed for appellant and plaintiff in error, as may sustain his objection to each; to which may be added propositions of his own, supported by like statements of what is in the record, so as to present his view of the case, citing the proceedings in the transcript, with the pages, when practicable, to which he refers in his statements.

41. Whatever of the statements of the appellant or plaintiff in error in his brief is not contested, will be considered as acquiesced in. To each of his said objections or propositions may be annexed his authorities, cited in the order indicated for the brief of appellant or plaintiff in error.

41a. On or before the day fixed for the hearing of the cause as prescribed by section 23 of the act hereinbefore referred to, and before the opening of the court, four copies of the brief of each of the parties required to be filed in the office of the clerk of the trial court, shall be filed with the papers in the cause in the office of the clerk of the Court of Civil Appeals.

42. When appellant or plaintiff in error has failed to prepare the case for submission, by the omission of what is required after bond or affidavit filed for appeal and for writ of error with citation served, the appellee or defendant in error, before the call of the case, may file in the Appellate Court a brief in the manner required of the appellant or plaintiff in error—except that his propositions will be shaped so as to show the correctness of the judgment—which the court may, in its discretion, regard as a correct presentation of the case, without examining the record further than to see that the judgment is one that can be affirmed upon the view of the case as presented by appellee or defendant in error. The appellee or defendant in error shall be entitled to the

custody of the transcript after it is filed in the Appellate Court, for the purpose of preparing his brief.

43. The appellee or defendant in error may submit the record upon a suggestion of delay, upon making a brief statement of the character of the suit, the proceedings therein, and the judgment rendered, which will be required in every case of such submission when appellant or plaintiff in error has filed no brief. If this is done in a case properly prepared for submission by appellant or plaintiff in error, it will be considered an acquiescence in the statement of appellant or plaintiff in error, in his brief, as to the contents of the record, and as merely a denial of the legal consequences contended for by the appellant or plaintiff in error, unless the appellee or defendant in error shall also file a brief, as heretofore provided, which he may do. If the appellant or plaintiff in error has not prepared the case for submission, the record will be examined sufficiently to ascertain that it is or is not properly a delay case, and if found to be a plain case of delay, it will be acted on as such; but if not, it will be reversed or referred back for a brief, or brief and argument, on one or both sides, as may be directed. In deciding under this rule, where the case has not been prepared for submission by the appellant or plaintiff in error, the court will be required to look only to the substantial merits as they may appear in the record.

44. When affirmance is asked upon certificate filed, there need be nothing more than a request for affirmance, signed by the party or his counsel. It shall not be submitted sooner than one week after being filed, if the court should be in session that length of time. The appellee or defendant in error may be heard on a motion to dismiss the certificate, or on a motion to file the transcript of the record, or on a motion to set aside judgment rendered, as in other cases of rehearing.

DEFECTIVE BRIEF.

45. In all cases wherein the brief or briefs are found insufficient, either in a proper presentation of the facts or proceedings in the case, or in the reference to the authorities, so as to enable the court to decide the case, the court may set aside the submission and refer it back, with such orders for postponement, filing of briefs, reference to authorities, by one or both parties, and reargument, written or oral, as may be deemed proper. If, however, one party has fully complied with the rules, and has filed a satisfactory brief that will enable the court to decide the case, and the other party is in default, and has not filed a satisfactory brief in accordance with the rules, the court may, in its discretion, disregard the latter party's brief, as if not filed in the case,

and act upon that alone which has been properly filed in accordance with the rules.

AGREEMENTS OF COUNSEL.

46. All agreements of parties or their counsel relating either to the merits or conduct of the case in the court, or in reference to a waiver of any of the requirements prescribed by the rules, looking to the proper preparation of an appeal or writ of error for a submission, shall be in writing, signed by the parties or their counsel, and filed with the transcript or be contained in it, and, to the extent that such agreement may vary the regular order of proceeding, shall be subject to such orders of the court as may be necessary to secure a proper preparation for a submission of the case.

ARGUMENTS OF COUNSEL.

47. When the case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor, may, upon the call of the case for submission, submit an argument to the court, either oral or plainly written or printed, which, if written or printed, may be left on file with the transcript, copies of which need not be furnished, unless printed.

48. The arguments must be upon the disputed points, whether of law or fact, in support of the propositions relied on, on one side, and objections and counter-propositions on the other, and it must be confined to them, avoiding any reference or comment upon positions taken in the trial court, or to other extraneous matters not involved in or pertaining to that which is found in the record.

49. In referring to statutes, that part directly bearing upon or relevant to the position, should be read at the bar, or stated in the written or printed arguments, and in citing elementary books or decisions of courts, the principle should be stated, or so much should be read or stated, as bears directly on, or tends to maintain, the proposition for which it is cited in the brief.

50. After the case has been presented to the court by such explanation as may be necessary, each side may be allowed an hour in argument at the bar, with twenty minutes more in conclusion by the appellant; and, after being so presented, if the magnitude or importance of the case or the difficulty of the questions seem to require it, a longer time may be allowed. Not more than two counsel on each side will be heard, except upon leave of the court.

51. If counsel for but one party has filed briefs, an argument

by him may be allowed, comformably to the preceding rules, as nearly as practicable, under the direction of the court.

52. Counsel who argue a case at the bar will be expected to be able to answer questions propounded by the members of the court, relating to the matters contained in the record, and to the laws or authorities cited in the argument.

53. Should it be apparent, during the progress of the trial, or afterwards, that the case has not been properly prepared, as shown in the transcript, or properly presented in the brief or briefs, or that the law and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission, or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case; or should it appear to the court, after the submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the plaintiff in error or appellant to furnish four printed copies of such statement of facts, and upon his failure to do so may disregard it. If the violation of the rule be flagrant, the court may disregard the statement of facts altogether, unless counsel for the appellant or plaintiff in error shall make it appear by affidavit or otherwise, that he prepared a statement giving what, in his opinion, he deemed a fair presentation of the evidence, prepared in accordance with the rules, and that he was unable to get it agreed to or approved. But should counsel for appellant or plaintiff in error show that he has used due diligence to have a proper statement of facts signed and approved, and that the statement of facts as prepared, is the result of the fault of the counsel for the opposite party, such as his failure or refusal to agree to a proper statement presented to him, the costs of printing the statement, if ordered, shall be taxed against the appellee, or defendant in error, as the case may be.

53a. If after the submission of the cause the court find that the transcript is not prepared as required by the rules, and that it contains matter which should not have been incorporated therein, the court may in their discretion decline to proceed further with the case, until the appellant or plaintiff in error presents a copy of the transcript from which all foreign matters have been omitted, and the court may in addition thereto, require that such copy shall be printed, and in case of the failure of such party to comply with the court's order within a reasonable time, to be specified in such order, the case shall be dismissed.

54. When a case has been properly prepared for submission, and a satisfactory oral argument has been made, the court will promptly announce its judgment, if practicable, at the next suc-

ceeding session of the court, and, when deemed necessary, deliver a written opinion, if not then, at some time during the term of the court.

CUSTODY OF TRANSCRIPT.

55. Neither the transcript nor any of the papers in a case shall be withdrawn from the custody of the clerk, nor taken from his office or the court room, without a receipt left therefor.

56. Cases, while under submission, either on the merits of the appeal or on motion, are no longer under the control of the attorneys; and, while so under submission, the clerk will not let the transcripts of such cases go out of his office, except on the order of one of the justices of the court. While not under submission, either before submission or after decision, the parties or their attorneys may, by complying with Rules 55 and 60, obtain possession of the transcript; provided, however, that when a case has been decided upon the merits of the appeal, no one, except the losing party or his attorney, shall be allowed to take the transcript out of the clerk's office, until after said party has filed his motion for a rehearing, or until the time for filing such motion has expired.

57. Original papers sent up with the transcript by order of the trial court for the inspection of the Appellate Court, will be retained in the office, and will not be allowed to go out of the custody of the clerk, except by order of one of the justices of the court, which order must be filed with the papers of the cause.

58. The clerk shall furnish the parties and counsel with an opportunity, when reasonably applied to for that purpose, to inspect the records, judgments, papers, opinions, books and dockets in his office in which they may be interested; but he shall not be required to permit copies thereof to be taken without his consent. He shall, upon tender of reasonable compensation, give certified copies of the records of his office.

59. The clerk shall be responsible for every transcript or other paper, in a cause, that is missing from his office, unless he can produce the receipt of an attorney for the same, or otherwise show, by satisfactory evidence, that some one took it from his custody, or from the court room, without his consent, or that said transcript had passed into the hands of one of the justices of the court, and had not been returned to his custody.

60. No attorney shall take, or suffer to be taken, any transcript or other paper for which he has receipted, out of the reach of the court, so that it can not be produced in court or in the clerk's office when it is needed.

61. The reporter shall have access to the minutes and judgments of the court, and shall have custody of the transcripts, briefs and opinions so long as may be necessary to discharge his duties as reporter.

62. In all cases in which appeals or writs of error are dismissed, the appellant, or party filing the transcript, without further leave of the court, shall have the right to withdraw the transcript, unless it contains original papers belonging to an adverse party, in which event leave of court shall be had before such original papers are withdrawn.

REHEARING IN THE COURTS OF CIVIL APPEALS.

63. Motions for rehearing shall be made and conducted strictly in accordance with the statute, which describes the manner of this proceeding.

64. Where a Court of Civil Appeals adjourns for the term within less than fifteen days after the rendition of judgment, the issuance of the mandate shall, unless otherwise ordered, be withheld until the expiration of said period; and if, within that period, an application for rehearing shall be presented to the clerk of the court at that place, the issuance of mandate shall be further withheld to await the action of the court on said application.

65. Upon the rendering of the judgment in the Court of Civil Appeals, as well as upon the making of an order overruling the motion for a rehearing, the clerk shall immediately give notice by postal card to the attorneys of the respective parties, of the disposition made of the cause or of the motion, as the case may be, for which service he shall tax the usual fee as a part of the costs in the case. But the mailing of such notices shall not relieve the parties of the responsibility of taking notice of the disposition of the cause or motion, and the failure to receive a notice so mailed shall be no excuse for delay in taking such future action as may be desired in reference to the case within the time prescribed by the statutes and rules.

66. Upon the presentation to him of an application for a writ of error, the clerk of the Court of Civil Appeals shall withhold the mandate until properly advised of the disposition of the case by the Supreme Court.

RULES FOR THE COURT OF CRIMINAL APPEALS.

1. The clerks of the Court of Criminal Appeals shall be governed by the rules applicable to the clerks of the Courts of Civil

Appeals, except where a different rule may be prescribed by statute.

2. The rules governing motions, arguments of counsel and applications for *certiorari* to complete the record as prescribed for the Courts of Civil Appeals, shall apply to the Court of Criminal Appeals.

RULES FOR THE DISTRICT AND COUNTY COURTS.

PLEADINGS.

1. The pleadings in the District and County Courts, shall, as prescribed by statute, be by petition and answer.

2. Pleadings, with the exception of those presenting issues of law, must be a statement of facts, in contradistinction to a statement of evidence, of legal conclusions, and of arguments. Facts are adequately represented by terms and modes of expression wrought out by long judicial experience, perpetuated in books of forms, in law and equity, which, though not authoritatively requisite, may generally be adopted as safe guides in pleading. In case of a violation of this rule, to such an extent as to produce confusion, uncertainty and unnecessary length in pleading, the court may require the matter set up to be repleaded, so as to exclude the superfluous parts of it from the record.

THE PETITION.

3. The petition of plaintiff shall consist of an original petition, and such supplemental petitions as may be necessary in the course of pleading by the parties to the suit, to enable the plaintiff to state all the facts presenting his cause of action, and such other facts as may be required to rebut the facts that may be set up in the original and supplemental answers, as pleaded by the defendant. The original petition and the supplemental petitions shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named and indorsed.

ORIGINAL PETITION.

4. The plaintiff, in the original petition, in addition to the names and residences of the parties and the relief sought, may state all of his facts, so as to present together different combinations of facts, amounting to a cause or causes of action, as has been the usual practice, or he may state the cause or causes of action in several different counts, each within itself presenting a

combination of facts, specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed on each one by the answer.

PLAINTIFF'S SUPPLEMENTAL PETITION.

5. The plaintiff's supplemental petitions may contain exceptions, general denials and the allegations of new facts not before alleged by him, in reply to those which have been alleged by the defendant.

THE ANSWER.

6. The answer of defendant shall consist of an original answer, and such supplemental answers as may be necessary, in the course of pleading by the parties to the suit, to enable the defendant to state all of the exceptions and facts, presenting his defense, as coutained in his original answer, or his cross-action, if one be set up in the original answer, and such other facts as may be required to rebut the facts that may be stated in the original and supplemental petitions, as pleaded by the plaintiff. The original answer and the supplemental answers shall be indorsed, so as to show their respective positions in the process of pleading, as "original answer," "defendant's first supplemental answer," "defendant's second supplemental answer," and so on, to be successively numbered, named and indorsed.

ORIGINAL ANSWER.

7. The original answer may consist of pleas to the jurisdiction, in abatement, of privilege, or any other dilatory pleas; of exceptions, general and special; of general denial, and any other facts in defense by way of avoidance or estoppel, the same being pleaded in the due order of pleading, as required by statute; and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Facts in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

SUPPLEMENTAL ANSWERS.

8. The defendant's supplemental answers may contain exceptions, general denial, and the allegations of new facts, not before alleged by him, in reply to that which has been alleged by the plaintiff.

9. The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained

in one instrument of writing, and so with the original answer and each of the supplemental answers.

10. Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party, and shall not repeat the facts formerly pleaded further than is necessary as an introduction to that which is stated in the pleading then being drawn up. These instruments, to-wit: the original petition and its several supplements, and the original answer and its several supplements, shall, respectively, constitute separate and distinct parts of the pleadings of each party; and the position and identity, by number and name, with the indorsement of each instrument, shall be preserved throughout the pleadings of either party.

11. Each party who files a supplement of any number (as first, second, third, and so on), shall give notice thereof by asking leave of the court, and filing the same amongst the papers of the cause, with the appropriate indorsement thereon, indicating its number and name.

AMENDMENT.

12. An amendment may be made by either party, upon leave of the court for that purpose, or in vacation, as prescribed by statute—the object of an amendment, as contradistinguished from a supplemental petition or answer, being to add something to, or withdraw something from, that which has been previously pleaded, so as to perfect that which is, or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment.

13. The party amending shall point out the instrument, with its date, sought to be amended, as "original petition," or "plaintiff's first supplemental petition," or others filed by the plaintiff, or as "original answer," or "defendant's first supplemental answer" or others filed by the defendant, and amend such instrument by preparing and filing a substitute therefor, entire and complete in itself, to be styled and indorsed, "amended original petition," or "amended first supplemental petition," or "amended original answer," or "amended first supplemental answer," and so on, accordingly as said instruments of pleading are designated in Rules 3 and 6.

14. Unless the substituted instrument shall be set aside on exceptions for a departure in pleading, or on some other ground, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and

exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

15. When either party may have occasion to plead new facts, additional to those formerly pleaded by him, which constitute an additional cause of action or defense permissible in the suit, he shall present it as an amendment to the original petition, or original answer (unless it is in its nature, a response to some pleading of the opposite party), by substitution, with the proper number, name and indorsement, in the same manner as other amendments.

16. When either supplement or amendment made to pleading is of such character, and is presented at such time as to take the opposite party by surprise (to be judged of by the court), it shall be cause for imposing the cost of the term upon, and charging the continuance of the cause (both or either) to the party causing the surprise, if the other party demand it, and shall make a satisfactory showing, or if it otherwise be apparent that he is not ready for trial, on account of said supplement or amendment being allowed to be filed by the court.

EXCEPTIONS TO PLEADING.

17. General exceptions shall point out the particular instrument in the pleadings, to-wit: the original petition or answer, or the respective supplements to either; and in passing upon such general exception every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency.

18. A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly the obscurity, inconsistency, duplicity, generality or other insufficiency in the allegations in the pleading objected to. The general expression that it is vague, uncertain, and the like, alone shall be regarded as no more than a general exception.

EXHIBITS IN PLEADING.

19. Notes, accounts, bonds, mortgages, records and all other written instruments, constituting, in whole or in part, the cause of action sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached and referred to as such, in aid and explanation of the allegations in the petition or answer made in reference to said instruments, but will not thereby relieve the pleader from making the proper allegations of which said exhibits may be the evidence, in whole or in part. No other instrument of writing, such as a deed, will, document, record of court, or agreement, which is not

sued on as a cause of action by plaintiff, or set up as matter relied on in defense by defendant, but is designed to be used only as evidence of some fact that is alleged, shall be made an exhibit in the pleading; and when it shall be so attempted, by attaching such instrument and referring to it as such, the court will, of its own motion, or at the instance of a party, cause the instrument to be detached from the pleading, and adjudge it to constitute no part thereof, by an order of court entered of record, at the cost of the party violating this rule, so as to prevent the pleadings from being incumbered with that which is or may be the only evidence in the case.

20. The office of a general denial by the defendant is to throw the burden of proof, as to the allegations denied, on the plaintiff. The defendant can not be permitted under this plea to introduce special matters in avoidance or estoppel, in evidence for his defense. And the same rule prevails when it is filed by plaintiff to facts in the cross-action or answer of defendant.

MOTIONS.

21. The clerk shall keep a motion docket in which all motions, when filed, shall be placed, with the names of the parties and counsel, with the date of filing and its number and the number of the case, which filing shall be considered notice of said motion before the continuance or final disposition of the case for the term, except where it is otherwise provided for by statute:

22. The court will set apart a particular day each week of the term, when the motions previously made, in which proper notice has been given, shall be determined, if urged, unless for good cause they are postponed to a day during the term, or continued by consent to the next term.

23. When notice shall be given of objections to the form or manner of taking and returning depositions, either party may require it to be put on the motion docket and tried as other motions; *provided*, if not tried sooner, it shall be decided before either party shall be required to announce readiness for trial on the facts.

DILATORY PLEAS, MOTIONS AND EXCEPTIONS, WHICH DO NOT GO TO THE MERITS OF THE CAUSE.

24. All dilatory pleas, and all motions and exceptions relating to a suit pending, which do not go to the merits of the case, shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by agreement of parties with the consent of the court; and all such pleas and mo-

tions shall be first called and disposed of before the main issue on the merits is tried.

MOTIONS AND EXCEPTIONS TO MERITS.

25. All motions which go the merits of the case, and all exceptions, general and special, which relate to the substance or to the form of the pleadings, shall be decided at the first term of the court, when the case is called in the regular order for trial on the docket, if reached, whether there be an announcement on the facts or not, unless passed by agreement of parties with the consent of the court.

CALL FOR TRIAL.

26. When the case is called for trial, the exceptions, if any remain undisposed of, shall be presented for determination, and shall then be decided before proceeding to the trial of the case on the facts, and if not presented, they shall be adjudged by the court to have been waived, and shall be so entered on the minutes of the court, the cost of filing to be taxed against the party filing them, and they shall constitute no part of the final record, unless some question be raised upon the action of the court in reference to them, and they are presented in a bill of exceptions.

27. When the exceptions have been presented and decided, leave may be granted to either or both parties to file an amendment in one instrument of writing separate from those which had been previously filed by each, which shall close the pleadings in the case to be then determined by the court, so as to decide all the questions of sufficiency arising upon them. In making this amendment, the party shall refer distinctly to such instrument as he desires to amend, by name and number, as in the other amendments, without repleading the whole of it, but shall succinctly state such additional facts to be added thereto as he may desire, and this amendment shall be styled and indorsed, "plaintiff's," or "defendant's trial amendment;" but if the case should not be then tried, the party or parties shall replead, as in other cases of amendment.

28. When the questions of law, if any, have been determined by the court, the judge may, before proceeding to trial, by the aid of the counsel, have the pleadings that have been held sufficient, or have not been excepted to, read over, if deemed necessary, and make a brief memorandum of the facts stated, or issue presented in the pleadings, and may read them out before the trial commences, so as to inform the parties of the view which is

entertained by the judge of the matters of fact in issue as presented by their pleadings.

29. The court, when deemed necessary in any case, may order a repleader on the part of one or both of the parties, in order to make their pleadings substantially conform to the rules.

30. These rules of pleading shall apply equally, so far as it may be practicable to apply them, to intervenors and to parties, when more than one, who may plead separately.

TRIAL OF THE CASE.

31. The plaintiff shall have the right to open and conclude, both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant, or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff has a good cause of action as set forth in the petition, except so far as it may be defeated, in whole or in part, by the facts of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, when the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause.

32. The court shall not be required to allow a case to go to trial on the facts, when the pleadings are obviously so defective that a material issue has not been formed; and in such case the court shall call the attention of the parties to such immaterial or defective issue, so that the time of the court may not be wasted.

33. A party who abandons any part of his cause of action or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried, and he shall be taxed with the cost incurred upon such pleading so abandoned. He shall also be taxed with the cost incurred upon pleading, in support of which no evidence was offered, to be determined by the court on motion at the term of the trial, and not afterwards.

COUNSEL AND ARGUMENTS.

34. Counsel for plaintiff, or for defendant, when he holds the affirmative of the issue, shall have the right to open and conclude, but if he waives the right to open the argument, he shall not have the right to conclude. This rule will apply to motions, exceptions to evidence, and all other matters presented to the court, except in rules to show cause, in which the party called on shall begin and end his cause.

35. An application for first continuance shall not be argued.

36. In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

37. Counsel for an intervenor shall occupy the position in the argument assigned by the court, according to the nature of the claim.

38. Arguments on questions of law shall be addressed to the court, and counsel shall state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

39. Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and, when indulged in, shall be promptly corrected as a contempt of court.

40. Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness, or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

41. The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

42. It shall be the duty of every counsel to address the court from his place at the bar, and, in addressing the court, to rise to his feet; and, while engaged in the trial of a case, he shall remain at his place in the bar.

43. But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

44. No more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.

45. The attorney first employed shall be considered the leading counsel in the case, and, if present, shall have control in the

management of the cause, unless a change is made by the party himself, to be entered of record.

46. An attorney of record is one who has appeared in the case, as evidenced by his name subscribed to the pleadings or to some agreement of the parties filed in the case; and he shall be considered to have continued as such attorney to the end of the suit in the trial court, unless there is something appearing to the contrary in the record.

47. No agreement between attorneys or parties touching any suit pending will be enforced, unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

48. Counsel of the party for whom a judgment is to be rendered, shall prepare the form of the judgment to be entered and submit it to the court.

49. Absence of counsel will be no good cause for continuance or postponement of the cause when called for trial, except to be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge, to be stated on the record.

50. No attorney, or other officer of the court, shall be surety in any cause pending in the court, except under special leave of court.

51. Any attorney who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading, presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.

52. After the court has pronounced its opinion upon a question made, no further argument will be heard; but if counsel think the court has fallen into error as to law or fact, they may submit a statement in writing, which the court will receive and consider.

BILLS OF EXCEPTION.

53. There shall be no bills of exceptions taken to the judgments of the court, rendered upon those matters, which, at common law, constitute the record proper in the case, as the citation, petition, answer, and their supplements and amendments, and motions for a new trial, or in arrest of judgment, and final judgment.

54. The charges of the court that are given, and those asked

that are refused, when signed by the judge and filed by the clerk, being made thereby a part of the record by statute, should not, in civil causes, be made a part of a bill of exceptions.

55. The rulings of the court upon applications for continuance and for change of venue, and other incidental motions, and upon the admission or rejection of evidence, and upon other proceedings in the case not embraced in the two preceding rules, when sought to be complained of as erroneous, must be presented in a bill of exceptions, signed by the judge and filed by the clerk, or otherwise made according to the statute, and they will thereby become a part of the record of the cause, and not otherwise.

56. Exceptions to evidence, admitted over objections made to it on the trial, may be embraced in the statement of facts, in connection with the evidence objected to, provided the statement of facts be presented to the judge within the time allowed for presenting bills of exceptions, and be filed in term-time.

57. Exceptions to the admission of evidence on the trial, where no reason is assigned for objecting to it, shall not be sustained where the evidence is obviously competent and admissible, as tending to prove any of the facts put in issue in the pleadings; and in all cases the court, when deemed necessary, may call upon the party offering the evidence to explain the object of its admission, and also upon the party excepting, the reason of his objections, which, when done in either or both cases, may form a part of the bill of exceptions.

58. Exceptions to the admission of evidence, where the ground of objection is assigned, shall be considered in reference to the objection made to it, and the objection shall be stated in the bill of exceptions taken to its admission or exclusion.

59. Bills of exception must state enough of the evidence, or facts proved in the case, to make intelligible the ruling of the court excepted to in reference to the issue made by the pleadings.

60. When exceptions are made to the admission or exclusion of the evidence on the trial before the court or before the jury, the exceptions will be then decided, after such argument as the court may allow, and a memorandum of the point ruled on will then be made by the judge, if the bills of exception are not then prepared and signed, which ordinarily should be done.

CHARGE OF THE COURT.

61. When the pleading of either or both parties contains several combinations of facts, either together or in several counts or pleas, each of which constitutes a cause of action or ground of defense, and is sufficiently supported by the evidence to require

a charge, and upon which an issue has been formed, the charge should be so framed as to present to the jury and require a finding by them upon the issue made, upon each of said combinations of facts so contained in the pleadings, which may be necessary to a decision of the case.

62. When a full charge upon the issues has been made, so far as the evidence adduced tending to establish them may require, the court should not encourage the asking of additional charges covering the same ground substantially, and charges asked and not given should not be read in the hearing of the jury, or taken by the jury in their retirement.

JUDGMENT.

63. The entry of the judgment should carefully recite the finding of the jury, or the several findings, if more than one, upon which the judgment of the court is based.

64. The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.

65. Judgments rendered upon questions raised upon citations, pleadings and all other proceedings, constituting the record proper as known at common law, must be entered at the date of each term when pronounced.

66. A cause that has been submitted for trial to the judge on the law and facts shall be determined and judgment rendered therein during the term at which it has been submitted, and at least two days before the end of the term, if it has been tried and submitted one day before that time, unless it is continued after such submission for trial, by the consent of the parties placed on the record, and in such event a statement of facts and bills of exception shall be prepared and filed upon a request in writing by either party.

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

67. Each ground of a motion for a new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designed to be complained of, in such way as that the point of objection can be clearly identified and understood by the court.

68. Grounds of objections couched in general terms—as that the court erred in its charge, and in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to the evidence, the verdict of

the jury is contrary to law, and the like—shall not be considered by the court.

69. When the case is determined by the judge without a jury, counsel in making a motion for new trial shall specify succinctly the supposed errors of law or fact, or both, into which the judge has fallen, as far as may be practicable to do so.

70. In motions for continuance, for the change of venue, and other preliminary motions made and filed in the progress of the cause, the rulings of the court thereon shall be considered as acquiesced in, unless presented in a bill of exceptions; and the rulings thereon shall be made a ground of objection in motions for new trial or in arrest of judgment, if they are desired to be relied on as grounds of error.

71. Motions for new trial and in arrest of judgment shall be determined on motion day of each week of the term, unless postponed to the next motion day, or, for good cause shown, to a subsequent day, and not later than two entire days before the adjournment of the court, at which time all such motions previously filed shall be determined.

THE STATEMENT OF FACTS.

72. Where the evidence adduced upon the trial of the cause is sufficient to establish a fact or facts alleged by either party, the testimony of witnesses, and the deeds, wills, records, or other written instruments, admitted as evidence, relating thereto, should not be stated or copied in detail into a statement of facts, but the facts thus established should be stated as facts proved in the case; *provided*, an instrument, such as a note or other contract, mortgage or deed of trust, that constitutes the cause of action, on which the petition, or answer, or cross-bill, or intervention is found, may be copied once in the statement of facts.

73. When there is any reasonable doubt of the sufficiency of the evidence to constitute proof of any one fact under the preceding rule, there may then be inserted such of the testimony of the witnesses and written instruments, or parts thereof, as relate to such facts.

74. When it becomes necessary to insert in a statement of facts any instrument in writing, the same shall be copied into the statement of facts before it is signed by the judge, and instruments therein only referred to and directed to be copied shall not be deemed a part of the record.

75. Where there is no dispute about, or question made upon, the validity or correctness in the form of a deed, or its record, a will or its probate, record of a court, or any written instrument

adduced in evidence, it should be described (and not copied), or its legal effect as evidence stated, as a fact established.

76. When questions are raised on such instruments as are mentioned in the preceding rules, only so much or such parts of them shall be copied into the statement of facts as may be necessary to present the question, and the balance of them shall only be described, or presented, as prescribed in the preceding rule.

77. The commissions, notices and interrogatories in depositions, adduced in evidence, shall in no case be inserted or copied into a statement of facts, but the evidence thus taken and admitted shall appear in the statement of facts, in the same manner as though the witness had been on the stand in giving his evidence, and not otherwise, in form or substance.

78. Neither the notes of a stenographer taken upon the trial, nor a copy thereof made at length, shall be filed as a statement of facts; but the statement made therefrom shall be condensed throughout in accordance with the spirit of the foregoing rules upon this subject.

CLERKS.

79. The clerks of the District and County Courts shall keep a court docket in a well-bound book, ruled into columns, in which they shall enter, in the *first* column, number of case and name of attorneys; *second*, names of the parties; *third*, nature of the action; *fourth*, the pleas; *fifth*, rulings of former terms; *sixth*, the motions and rulings of the present term.

80. The cases shall be placed on the docket as they are filed.

81. The clerk shall at each term make out two copies of this docket, one for the use of the court, and one for the use of the bar.

82. In preparing the court docket, it shall be the duty of the clerk to designate the suits by regular consecutive numbers, called *file numbers*, and he shall mark on each paper in every case, the file number of the cause.

83. In every case appealed to a Court of Civil Appeals, the clerk shall, in making up the docket at each succeeding term, keep the said cause in its proper place on the docket for disposition after being decided; and at the next term after issuing a writ of error, the clerk shall replace the cause on the docket, with its original file number.

84. In making a complete record, as prescribed by statute, all the proceedings in the case shall be entered in the order of time in which they occur; *provided*, amended pleadings shall take the place of those for which they are substituted, and the pleading thus superseded (except such as are specified in Rule 14), and

those that are abandoned as shown by an order or judgmont ef the court, shall be left out of the record.

TRANSCRIPT ON APPEAL OR WRIT OF ERROR.

85. In making a transcript, the proceedings shall be entered in the order of time in which they occurred, as prescribed in the preceding rule, unless, with the approval of the judge, counsel on each side shall agree in writing, to be itself filed and copied in the transcript, directing the clerk which of the papers may be left out, as being useless in the decision of the case; *provided*, subpœnas shall not be inserted, nor shall the citations, in cases where the defendant or defendants have filed answers, unless some question is made upon them which will require them to be copied.

86. All bills of exceptions and statements of facts shall be literally transcribed; and the clerks are hereby prohibited from copying as parts of the same any instrument in writing, or document not originally inserted therein, but merely referred to and directed to be copied from some other paper in the case.

87. In copying the proceedings inserted in the transcript, there shall be a space left between them, so that each one can readily be distinguished.

88. On the left hand margin of the page of each proceeding the clerk shall note its name, and the date of its occurring or being filed. This may be dispensed with in printed transcripts; but in all cases the clerk shall copy, in connection with each paper filed, the file mark subscribed or indorsed thereon.

89. The pages shall be numbered at the bottom, on the left hand of each page.

90. The transcript may be either written or printed. If written, it shall be on good white paper, with black ink, in a plain, round hand, not confused by running words together or by flourishes, and with sufficient space between the lines to be easily read, and on one side only of each sheet of paper, with no sheets cut or mutilated, and the sheets shall be entire and filled with writing, so as to leave no blanks larger than the ordinary spaces left between the different proceedings to distinctly separate them; and all the sheets upon which it is written shall be fastened together at the upper end with tape, ribbon, or something of the kind, and sealed over the tie with the seal of the court. When the transcript is printed it must be on both sides of the paper, in not less than small pica type, bound and paged in pamphlet form, of octavo size, and fastened at the back with the tie and seal of the court; but in other respects shall conform to the rules laid down for written transcripts.

91. The caption of the transcript shall be in the following orm, to wit:

"THE STATE OF TEXAS, }
"County of..... }

"At a term of the District [or County] Court, begun and holden at....., within and for the county of....., before the Hon. ....and ending on the... ....day of....., A. D....., the following case came on for trial, to wit:

"A. B., plaintiff,

v.

"C. D., defendant."

92. There shall be an index on the first pages preceding the caption, giving the name and page of each proceeding, including the name and page of each instrument in writing and agreement, and the testimony of each witness in the statement of facts, as it appears in the transcript. The index shall not be alphabetical, but shall conform to the order in which the procedings appear as transcribed.

93. The transcript shall contain a bill of costs, regularly made out and copied.

94. It shall conclude with a certificate, under the seal of the court, that it contains a true copy of all the proceedings in the cause, and shall be dated and signed officially by the clerk.

95. The clerk, having made a transcript, upon the application of either party or his counsel, as prescribed in case of appeal, and in case of writ of error, as directed by law, shall deliver it to such party or his counsel, when so made out, on demand.

96. The notice of appeal and giving a bond on an appeal, and the filing of a petition and bond for writ of error, and the service of citations, will be regarded as an application to the clerk to prepare at once a transcript of the record for the appellant, or plaintiff in error, without further application.

97. The appellee, or defendant in error, or his counsel, to be entitled to a transcript of the record, shall specially make an application to the clerk to make it out for him.

98. The clerk, having prepared a transcript, shall indorse upon it as follows, to-wit:

"J. K., Appellant, or Plaintiff in Error,

v.

"N. M., Appellee, or Defendant in Error.

"From ..... County"

And on delivery of it to the party, or to his counsel, who had applied for it, he shall in all cases indorse upon it, before it finally leaves his hands, as follows:

"Applied for by P. S. on the .... day of ....., A. D. ....., and delivered to P. S. on the .... day of ....., A. D. ....., " and shall sign his name officially thereto. The same indorsement shall be made on certificates for affirmance of the judgment.

99. Unless when specially directed by statute, the clerk of a trial court is not bound to transmit any transcript to a Court of Civil Appeals.

100. When the clerk shall have presented a transcript for examination to the party or his counsel who has applied for it, and it is found, in any particular whatever, to have been made out in violation of any of the preceding requirements, he shall be at liberty to return it as not being a complete and properly prepared transcript, in time for correction by the clerk. And the reception of it by the party or his counsel, without being so returned for such purpose, will be regarded as an assumption by him of all responsibility for any and all deficiencies found in the transcript, resulting from the violation of these rules or of the statutes.

ASSIGNMENT OF ERRORS.

101. The appellant or plaintiff in error shall file his assignments of error in the trial court as prescribed by statute; and the appellee or defendant in error may file cross-assignments with the clerk of the trial court when he files his brief, which assignments may be incorporated in his brief and need not be copied in the transcript. In such case one of the copies filed in the Courts of Civil Appeals shall contain a certificate of the clerk of the trial court showing that it is a copy of the brief filed in his office, and the date of its filing.

BRIEFS.

102. Appellant or plaintiff in error shall file a copy of his brief in the trial court as directed by statute, which shall be received by the clerk, and he shall indorse upon it his filing, with the date of its delivery to him, and keep it among the papers of the cause, subject to inspection, in his office, by any of the parties or their counsel, and shall upon request, deliver a certified copy of it, and of his filing, with its date; or if copies thereof shall be presented to him, he shall certify thereto for the party requesting it, but it shall not be copied in the transcript.

JURISDICTION OF THE DISTRICT COURT OVER APPEALS OR WRITS OF ERROR.

103. When there shall be no bond or affidavit filed, the appeal or writ of error shall be considered as abandoned.

104. When no transcript of the record, or no certificate for affirmance has been filed in a Court of Civil Appeals, at the term of the court to which the appeal or writ of error in which citation has been served is returnable, the appeal or writ of error shall be considered as abandoned, of which the certificate of the proper clerk of the Appellate Court, given at the end of said term, that no such case has been filed in said court, shall be *prima facie* evidence.

105. Rules for the government of the District and County Courts, heretofore made and published, shall be superseded from and after the time when these rules shall go into effect.

RULES OF THE DISTRICT COURT IN APPEALS IN ADMINISTRATION CASES FROM THE COUNTY COURT.

106. Motions to dismiss appeals shall be placed on the motion docket and determined as other motions.

107. Motions for *certiorari* to perfect the record shall be accompanied by a sworn statement, showing in what particular the transcript is defective, unless it shall sufficiently appear by the record itself. The cost of the motion and additional record, and of the term, if it causes a continuance of the case, shall be taxed against the appellant, whose duty it is to have a correct record filed, at the discretion of the court.

108. In appeals from the County Court in cases pertaining to the estates of deceased persons, the transcript shall not contain anything which does not relate to the order, decision or judgment appealed from. Where the appeal has been taken by the same person from more than one order, decision or judgment entered of record in the same estate, at the same term of the County Court, all of the proceedings in each appeal being kept distinct, may be embraced in the same transcript.

RULES GOVERNING IN CRIMINAL CASES IN COUNTY AND DISTRICT COURTS.

109. The clerks of the District and County Courts shall record the proceedings had in their courts in the order of time in which they occur.

110. The record should show, and it should appear in the transcripts of the record for the Court of Criminal Appeals:

First. That the indictment was presented in open court, a quorum of the grand jury being present.

Second. That the defendant pleaded to the indictment, or that a plea was entered for him.

Third. In capital felonies, that the defendant was arraigned and pleaded, or that, upon his refusal to plead, a plea was entered by the court.

Fourth. That the jury trying the cause were empaneled and sworn according to law.

Fifth. That a final judgment was entered in the cause.

111. Transcripts of the record for the Court of Criminal Appeals shall not be encumbered with copies of capiases, bonds, recognizances, subpœnas, attachments for witnesses, or any of the proceedings had on a former trial, where a new trial has been granted, unless there is some question expressly raised on the trial, with reference to such proceedings, which requires revision in the Court of Criminal Appeals, or in *scire facias* cases, on appeal or writ of error.

112. In preparing transcripts the following order shall be observed, to-wit:

First. The index, which must refer to the proceedings in the order they appear in the record.

Second. The caption, which shall be as follows: "The State of Texas, county of..... At a term of the.....court, begun and holden within and for the county of.....at.....on the .....day of....., A. D. 18.., and which adjourned on the .....day of....., A. D. 18.., the Hon....., judge thereof, presiding, the following cause came on for trial, to-wit:

"No..... } *The State of Texas,*
v.
A. B....."

Third. The time and manner of the presentation of indictment.

Fourth. The indictment or information.

Fifth. The pleas of defendant.

Sixth. The verdict and judgment.

Seventh. The statement of facts.

Eighth. The charge of the court.

Ninth. The charges refused.

Tenth. Bills of exception.

Eleventh. Motion for new trial, and motion in arrest of judgment, and notice of appeal.

Twelfth. Such other pleas, motions and orders as are made during the trial of the cause.

Thirteenth. Final judgment [or in a misdemeanor case the recognizance or statement that defendant is in jail].

Fourteenth. Assignment of errors, if any are filed, and request, if any, to send transcript to a branch of the court other than that to which the appeal is returnable.

Fifteenth. Certificate of the clerk, under the seal of the court, which shall certify that the transcript contains a true copy of all the proceedings had in the cause.

113. In preparing the transcript the following directions must also be observed: It shall be written on good paper, on one side only, in a neat, legible hand, free from erasures and interlineations, leaving a margin of sufficient width, in which margin the clerk shall note the name of each proceeding, and the time of its occurring or being filed, and at the left-hand lower corner, mark the number of each page. At the end of each paper must be copied the file marks indorsed thereon, and a space should be left between the record of each separate paper or proceeding.

114. The transcript must be fastened at the upper end with tape or ribbon, and sealed over the tie with the seal of the court, and folded and indorsed as follows:

"A. B., appellant,

v.

The State, appellee.

"From....county District Court [or County Court], A. D. 19.."

115. The statement of facts must contain a full and complete statement of all facts in evidence on the trial of the cause, including the copies of all papers, documents and exhibits adduced in evidence, also the proof of venue and identification of defendant.

116. The transcript of the record, where defendant has been convicted of a misdemeanor, must be delivered to the party appealing, or his counsel, but if not applied for before the twentieth day before the commencement of the term of the Court of Criminal Appeals to which the appeal is returnable, the clerk shall transmit the same by mail, paying the postage thereon, to the clerk of the Court of Criminal Appeals.

117. Transcripts of the record, where defendants have been convicted of a felony, shall be prepared within twenty days after the adjournment of the court, and sent by mail, postpaid, to the clerk of the Court of Criminal Appeals, at the branch to which the appeal is returnable. But where the defendant or his counsel directs the transcript to be sent to a branch of the court where the term is held before the term to which the appeal is re-

turnable by law, the clerk shall so transmit it, and send with such transcript a certified copy of such order or direction.

118. The clerk shall immediately after the adjournment of the court at which appeals in criminal cases are taken, make out a certificate under his seal of office, exhibiting a list of all such cases where the defendant has appealed. This certificate shall show the style of the cause upon the docket, the offense of which the defendant stands convicted, the day on which the judgment was rendered, and the day on which the appeal was taken, which list he shall transmit to the attorney general at Austin.

119. It shall be the duty of the district and county attorneys to see that the judgments in criminal cases are properly entered by the clerks, and, when practicable, they should be present when the minutes are read.

GENERAL RULES.

1. Any supposed violation of the rules prescribed in the conduct of a cause, to the prejudice of a party, may be reserved by bill of exception, presented as a ground for new trial, and assigned as error by the party who may conceive himself aggrieved by such supposed violation.

2. The foregoing rules shall go into effect and be of force in all the courts of the State, to which they are applicable, from and after this date (October 8, 1892); but shall not affect cases pending in the Supreme Court at the time of the organization of the Courts of Civil Appeals, which cases shall be controlled by the rules for the government of the Supreme Court at the time the appeals in such cases were perfected. Except as to such cases, all former rules are hereby superseded.

CLERK'S OFFICE, SUPREME COURT,
AUSTIN, TEXAS, September 15, 1898.

I, Charles S. Morse, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing thirty-six pages contain a true and correct copy of the rules adopted by this court on the 8th day of October, 1892, together with all amendments made thereto up to this date, for the government of the courts of Texas. I further certify that all of said rules and amendments are now in force and effect.

WITNESS MY HAND and the seal of said court this the
[L. S.] 15th day of September, A. D. 1898.

CHAS. S. MORSE, Clerk.

APPELLATE JURISDICTION OF SUPREME COURT.

SUPREME COURT—WRITS OF ERROR TO COURTS OF CIVIL APPEALS.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That article 1011a of the Revised Civil Statutes of Texas, as amended by chapter 14 of the acts of the special session of the Twenty-second Legislature, be amended so as to read as follows:

Article 1011a. All cases shall be carried up to the Supreme Court by writs of error upon final judgment, and not on judgments reversing and remanding cases, except in the following cases, to-wit:

1. Where the State is a party or where the Railroad Commissioners are parties.
2. Cases which involve the construction and application of the Constitution of the United States or of the State of Texas, or of an act of Congress.
3. Cases which involve the validity of a statute of the State.
4. Cases involving the title to a State office.
5. Cases in which a Civil Court of Appeals overrules its own decisions or the decision of another Court of Civil Appeals, or of the Supreme Court.
6. Cases in which the judges of any Court of Civil Appeals may disagree.
7. Cases in which any two of the Courts of Civil Appeals may hold differently on the same question of law.
8. When the judgment of the Court of Civil Appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error, and the attorneys for petitioners shall state that the decision of the Court of Civil Appeals practically settles the case, in which case, if the Supreme Court affirms the decision of the Court of Civil Appeals, it shall also render final judgment accordingly.

Whereas, there are a great number of bills now pending, and the session is nearing its close, therefore there exists an imperative public necessity and emergency that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect from and after its passage, and it is so enacted.

Approved May 6, 1895.

PROCEDURE TO OBTAIN WRIT OF ERROR IN SUPREME COURT.

SUPREME COURT—WRITS OF ERROR TO COURTS OF CIVIL APPEALS.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That article 1011b of the Revised Civil Statutes of Texas, as amended by chapter 14 of the acts of the special session of the Twenty-Second Legislature be amended so as to read as follows:

Article 1011b. Any party desiring to sue out a writ of error before the Supreme Court shall present his petition addressed to said court, stating the nature of his case and the grounds upon which the writ of error is prayed for, and showing that the Supreme Court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court. The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing, and thereupon the said clerk of the Court of Civil Appeals shall note upon his record the filing of said application, and shall forward to the clerk of the Supreme Court the said application, together with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals; *Provided*, that the party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the said record to and from the clerk of the Supreme Court, which sum shall be charged as costs in the suit. If the writ of error be granted and the plaintiff in error has given no bond, then the Supreme Court in granting the writ shall specify what bond shall be given, and the plaintiff in error shall file said bond in the trial court, to be approved by the clerk of said court, and a certified copy thereof shall at once be transmitted to the Supreme Court, and upon the filing of said certified copy the clerk of the Supreme Court shall issue the citation in error as may be prescribed by the rules of the Supreme Court.

Approved May 6, 1895.